DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-992
Title: Ray Haluch Gravel Company, et al., Petitioners
v.
Central Pension Fund of the International Union of Operating Engineers and Participating Employers, et al.
Docketed: February 12, 2013
Linked with 12A551
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (11-1944)
Decision Date: September 12, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 30 2012	Application (12A551) to extend the time to file a petition for a writ of certiorari from December 11, 2012 to February 8, 2013, submitted to Justice Breyer.
Dec 3 2012	Application (12A551) granted by Justice Breyer extending the time to file until February 8, 2013.
Feb 8 2013	Petition for a writ of certiorari filed. (Response due March 14, 2013)
Feb 21 2013	Order extending time to file response to petition to and including May 13, 2013.
May 13 2013	Brief of respondents Central Pension Fund of the International Union of Operating Engineers and Participating Employers, et al. in opposition filed.
May 24 2013	Reply of petitioner Ray Haluch Gravel Company, et al. filed.
May 28 2013	DISTRIBUTED for Conference of June 13, 2013.
Jun 17 2013	Petition GRANTED.
Jul 11 2013	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 28, 2013.
Jul 11 2013	The time to file respondents' brief on the merits is extended to and including October 23, 2013.
Aug 27 2013	Joint appendix filed. (Statement of costs filed)
Aug 27 2013	Brief of petitioners Ray Haluch Gravel Company, et al. filed.
Sep 17 2013	SET FOR ARGUMENT ON Monday December 9, 2013
Sep 17 2013	CIRCULATED
Oct 2 2013	Record from U.S.C.A. for 1st Circuit is electronic and is available on PACER.
Oct 3 2013	Record from U.S.D.C. for District of Massachusetts is electronic and is availabe on PACER.
Oct 23 2013	Brief of respondents Central Pension Fund of the International Union of Operating Engineers and Participating Employers, et al. filed. (Distributed)

Nov 22 2013	Reply of petitioners Ray Haluch Gravel Company, et al. filed. (Distributed)
Dec 9 2013	Argued. For petitioners: Dan Himmelfarb, Washington, D. C. For respondents: James A. Feldman, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

12-992

No.

In the Supreme Court of the United States

RAY HALUCH GRAVEL CO., ET AL.,

Petitioners,

v.

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), this Court held that a district court's decision on the merits that left unresolved a request for statutory attorney's fees was a "final decision" under 28 U.S.C. § 1291. The question presented in this case, on which there is an acknowledged conflict among nine circuits, is whether a district court's decision on the merits that leaves unresolved a request for *contractual* attorney's fees is a "final decision" under 28 U.S.C. § 1291.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners here, and defendants-appellees/cross-appellants below, are Ray Haluch Gravel Co.; Ray Haluch Inc., d/b/a Ray Gravel Co.; Ray Haluch, Inc., d/b/a Ray Haluch Gravel Co.; Ray Haluch Gravel Company, Inc., d/b/a Ray Haluch Gravel Co.; Raymond Haluch, individually and as an Officer of Ray Haluch, Inc. and Ray Haluch Gravel Company, Inc.; and Raymond Haluch, individually and d/b/a Ray Haluch Gravel Co.

Respondents here, and plaintiffs-appellants/cross-appellees below, are Central Pension Fund of the International Union of Operating Engineers and Participating Employers, by Michael R. Fanning, as Chief Executive Officer; International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, by Barbara Lane, as Administrative Manager; International Union of Operating Engineers Local 98 and Employers Cooperative Trust, by William Sullivan and Eugene P. Melville, Jr., as Trustees; International Union of Operating Engineers Local 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager; and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, by Barbara Lane, as Administrative Manager.

CORPORATE DISCLOSURE STATEMENT

No petitioner has a parent corporation and no publicly held company owns 10% or more of any petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 695 F.3d 1. The judgment of the court of appeals dismissing petitioners' cross-appeal (App., *infra*, 19a) is unreported. The district court's memorandum and order setting forth its findings of fact and conclusions of law (*id.* at 20a-38a) is reported at 792 F. Supp. 2d 129. The district court's judgment (App., *infra*, 39a-40a) is unreported. The district court's memorandum and order regarding respondents' motion for attorney's fees (*id.* at 41a-48a) is reported at 792 F. Supp. 2d 139.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2012. On December 3, 2012, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including February 8, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

1. 28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

2. 28 U.S.C. § 2107(a) provides, in relevant part: "[N]o appeal shall bring any judgment, order or de-

cree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

3. Federal Rule of Appellate Procedure 4(a)(1)(A) provides, in relevant part: "In a civil case, * * * the notice of appeal * * * must be filed with the district clerk within 30 days after entry of the judgment or order appealed from."

STATEMENT

The district court in this case issued a decision on the merits and then awarded attorney's fees in a separate order more than a month later. Respondents filed a notice of appeal within 30 days of the latter order but not within 30 days of the former one. The same situation arose in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), and this Court unanimously held that the notice of appeal was timely as to the decision on attorney's fees but not as to the decision on the merits, because the fee award was collateral.

Despite the fact that *Budinich* adopted a "bright-line rule," 486 U.S. at 202, the First Circuit in this case held that the notice of appeal was timely as to *both* decisions—and proceeded to vacate them. It distinguished *Budinich* on the ground that the attorney's fees in that case were based on a statute, whereas those in this case are based on a contract. It adopted a rule according to which a contractual fee award is *not* collateral when it is part of the "merits," and then determined that the fee award in *this* case was part of the "merits." The First Circuit thus concluded that there was no appealable "final decision"

in the district court, 28 U.S.C. § 1291, until the fee award was made.

Every relevant consideration weighs in favor of a grant of certiorari. As both the First Circuit and others have recognized, the courts of appeals are "divided" and "in disarray" on this issue, App., *infra*, 2a, 6a, with four circuits (including the court below) holding that contractual fee awards are *sometimes* collateral, one circuit holding that they are *never* collateral, and four circuits holding that they are *always* collateral. The First Circuit's decision conflicts, not only with decisions of other circuits, but also with *Budinich* itself, since it depends on a case-by-case and hard-to-apply distinction—between "merits" and "nonmerits" fee awards—that *Budinich* expressly rejected. The decision below is therefore wrong, as are the decisions of the courts the First Circuit followed. Beyond this, the question presented is a recurring and important one, and this case is an unusually good vehicle for deciding it.

A. This Court's Decision In *Budinich*

Federal courts of appeals have jurisdiction of appeals from all "final decisions" of district courts. 28 U.S.C. § 1291. A notice of appeal ordinarily must be filed within 30 days after entry of the judgment or order appealed from. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). This time limit is mandatory and jurisdictional. *Bowles* v. *Russell*, 551 U.S. 205 (2007).

In *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), the district court had issued a decision on the merits on May 14, 1984 and a separate decision on attorney's fees (which were recoverable by "the winning party" under a state statute) on August 1,

1984. *Id.* at 197-198 (quoting Colo. Rev. Stat. § 8-4-114 (1986)). The plaintiff sought to appeal both decisions in a notice of appeal filed on August 29, 1984, which was less than 30 days after the decision on attorney's fees but more than 30 days after the decision on the merits. *Id.* at 198. This Court unanimously held that the appeal was timely as to the decision on attorney's fees, which were collateral, but not as to the decision on the merits, which was final when entered. *Id.* at 198-203.

The principal justification for the Court's decision was that, at least "[a]s a general matter," "a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Budinich*, 486 U.S. at 200. The Court rejected the view that "the general status of attorney's fees" for Section 1291 purposes "must be altered" when, as was assertedly the case in *Budinich*, the "law authorizing them" characterizes the fees as "part of the merits judgment." *Id.* at 201.

In rejecting the proffered distinction between "merits" and "nonmerits" fee awards, the Court emphasized that "[t]he considerations that determine finality are not abstractions," but instead demand a "practical approach." *Budinich*, 486 U.S. at 201-202 (internal quotation marks omitted; brackets added by Court). What is "of importance" under this approach, the Court explained, is not "preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits,'" but rather "preservation of operational consistency and predictability in the overall application of § 1291." *Id.* at 202. This requires "a uniform rule." *Ibid.*

The Court went on to say that "no interest pertinent to § 1291 is served by according different treat-

ment to attorney's fees deemed part of the merits recovery," and that "a significant interest is disserved"—namely, that "[t]he time of appealability, having jurisdictional consequences, should above all be clear." *Budinich*, 486 U.S. at 202. The Court thus was "not inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known." *Ibid.* Instead, the Court concluded that "[c]ourts and litigants are best served by [a] bright-line rule." *Ibid.*

B. The District Court's Decisions

Petitioner Ray Haluch, Inc. originally operated a sand and gravel business that performed construction work. App., *infra*, 2a, 23a-24a. For the past 20 years, however, it has operated a business that sells landscaping products. *Id.* at 2a, 24a. In June 2005 petitioner Ray Haluch Gravel Company, Inc., a related entity, entered into a collective bargaining agreement with respondent union. *Id.* at 2a-3a, 24a, 49a-55a. The agreement obligated the company to make certain contributions to respondent union-benefit funds. *Id.* at 3a. It also provided that "[a]ny costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer." *Id.* at 9a, 52a.

Petitioner Ray Haluch, who owned the business until 2006, believed that the collective bargaining agreement required that benefits be paid only on behalf of an employee named Todd Downey. App., *infra*, 24a. After the funds commissioned an audit of the company, they demanded additional contributions on behalf of an employee named Martin Jagodowski and unidentified employees who had worked at the company after Jagodowski left. *Id.* at 3a, 26a-

27a. The company refused to make the payments. *Id.* at 3a, 28a.

On September 25, 2009, respondents sued petitioners in the District of Massachusetts, Dist. Ct. Dkt. 1, seeking to recover benefit-plan contributions under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, and the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141 *et seq.* The complaint demanded $35,863.06 in contributions on behalf of Jagodowski and $156,988.54 on behalf of unidentified employees. App., *infra*, 46a. In February 2011 the district court conducted a three-day bench trial and took the matter under advisement. *Id.* at 3a, 20a. Five weeks later respondents filed a motion for attorney's fees and costs. The motion sought a total of $143,600.44, the overwhelming majority of which consisted of attorney's fees for litigating the case. Dist. Ct. Dkt. 69. The district court issued two decisions that are relevant here.

On June 17, 2011, the district court issued a memorandum and order setting forth its findings of fact and conclusions of law. App., *infra*, 23a-38a. The court found that respondents were entitled to recover benefit contributions for certain hours worked by Jagodowski, *id.* at 28a-33a, but not for hours worked by unidentified employees, *id.* at 35a-38a, because there was "no evidence * * * indicating that *any* other classified employee actually performed work under the [collective bargaining] [a]greement after Jagodowski left," *id.* at 37a. The court awarded respondents $10,267.11 in delinquent contributions and deductions, $8,545.31 in interest, and $8,084.99 in liquidated damages, for a total award of $26,897.41. *Id.* at 33a-35a. The court directed the

clerk to enter judgment for respondents in that amount and stated that it would rule on respondents' motion for attorney's fees "in a separate memorandum to follow." *Id.* at 38a. A judgment in the case was issued the same day. *Id.* at 39a-40a.[1]

On July 25, 2011, the district court issued its separate memorandum on attorney's fees and costs. App., *infra*, 41a-48a. After calculating the fee "lodestar," *id.* at 41a-46a, the court reduced it to account for the fact that respondents had recovered less than they sought on behalf of Jagodowski and nothing at all on behalf of unidentified employees, *id.* at 46a-47a. The court ultimately awarded respondents $18,000 in attorney's fees, together with $16,688.15 in costs. *Id.* at 47a.

On August 15, 2011, respondents filed a notice of appeal of both the district court's order and judgment of June 17, 2011 (addressing remittances) and its order of July 25, 2011 (addressing attorney's fees). Dist. Ct. Dkt. 75. Respondents' notice of appeal was filed less than 30 days after the district court's decision on attorney's fees but more than 30 days after its decision on remittances. Petitioners filed a cross-appeal a week after respondents filed their appeal. Dist. Ct. Dkt. 77.

C. The Court Of Appeals' Decision

1. After the notices of appeal were filed, the court of appeals issued an order expressing concern that it "may only have jurisdiction to review the memorandum and order that entered on plaintiffs' motion for

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[1] In the June 17 order the district court also denied a motion by petitioners to enforce a settlement agreement. App., *infra*, 21a-23a. That ruling is no longer at issue.

attorneys' fees" and directing the parties to address "why the appeal should include an appeal from the district court's" earlier order and judgment on remittances. 10/3/11 C.A. Order at 2. After hearing from respondents, the court directed that a briefing schedule be set and invited the parties "to address any question of timeliness in their briefs along with the merits." 1/24/12 C.A. Order.

The parties did so, with respondents taking the position that their appeal was timely as to both decisions, Resp. C.A. Br. 18-25; Resp. C.A. Reply Br. 3-9, and petitioners taking the position that it was timely only as to the later one, Pet. C.A. Br. 10-16; Pet. C.A. Reply Br. 1-2. On the merits, respondents claimed that they were entitled to additional remittances for unidentified employees and that, because they were entitled to additional remittances, the award of attorney's fees was too low. Resp. C.A. Br. 25-47. In their cross-appeal, petitioners claimed that the attorney's fees were too *high*, because the district court failed to disallow or at least reduce the amounts attributable to travel time and expenses. Pet. C.A. Br. 16-19. Petitioners did not challenge the order on remittances.

2. The court of appeals held that it had jurisdiction to review both of the district court's orders, vacated each of them, and remanded for further proceedings. App., *infra*, 1a-18a.

a. The court of appeals observed that the jurisdictional question in this case was an "issue[] of first impression in this circuit" but one that has "divided our sister circuits." App., *infra*, 2a. That question, according to the First Circuit, is whether respondents' "notice of appeal was timely as to the first judgment," which in turn requires a determination of

"whether the first judgment was a final judgment." *Id.* at 5a. The court of appeals recognized that "[t]he point of embarkation for this inquiry" is *Budinich*, which held that "[t]he judgment on the merits" in that case was "final when rendered"; that "the fees issue was wholly collateral"; and that the appeal therefore was untimely as to the judgment on the merits, because it "should have been taken within thirty days" of that decision but was not. *Id.* at 5a-6a.

The court of appeals pointed out that, on "the question of where and how" the "bright-line rule" of *Budinich* "should be drawn" in a case, like this, that involves a *contractual* (as opposed to statutory) fee provision, "the courts of appeals * * * are in disarray." App., *infra*, 6a. While the Second, Fifth, Seventh, and Ninth Circuits "have held that *Budinich* applies to all claims for attorneys' fees," the First Circuit noted, the Fourth, Eighth, and Eleventh Circuits "have held, on various rationales, that contractual claims for attorneys' fees may fall beyond the *Budinich* line." *Id.* at 6a-7a.

The court of appeals aligned itself with the latter group, concluding that *Budinich* should not be read to apply to "all claims for attorneys' fees." App., *infra*, 7a. Instead the First Circuit held that, "[w]here, as here, an entitlement to attorneys' fees derives from a contract rather than from a statute, the critical question is whether the claim for attorneys' fees is part of the merits." *Id.* at 8a.

Analyzing the contract at issue in this case, and respondents' claim under it, App., *infra*, 8a-9a, the court of appeals determined that the fees here "are damages"; that, as such, they "are part of the merits of [respondents'] contract claim"; and that they ac-

cordingly "fall beyond the line drawn by the *Budinich* Court." *Id.* at 9a. In reaching this conclusion, the First Circuit found it "[p]ertinent[]" that respondents "sought recovery of both unpaid remittances and attorneys' fees" in their complaint, *id.* at 3a, and that they "consistently have asserted an entitlement" to fees "[t]hroughout the litigation," *id.* at 8a-9a. The court also found it significant that the agreement in question provided, not that "a prevailing party would be entitled to attorneys' fees," but rather that the employer was required to pay "[a]ny costs, including legal fees, of collecting payments due" the funds. *Id.* at 9a (quoting collective bargaining agreement).

The court of appeals thus found that "no final judgment entered until the district court resolved the contract-based claim for attorneys' fees" and that respondents' appeal was for that reason "timely as to all the issues raised." App., *infra*, 9a.

b. Having concluded that it had jurisdiction to review both the district court's order and judgment on remittances and its order on attorney's fees, the court of appeals vacated both of them and remanded for further proceedings. App., *infra*, 9a-18a. As to remittances, the First Circuit agreed with respondents that "the district court should have ordered additional payments with respect to certain unidentified employees," *id.* at 9a-10a, and remanded for a determination of "remittances owed on account of covered work" by those employees, *id.* at 17a. As to attorney's fees, the court of appeals ruled that, because the district court's fee calculation rested in part on respondents' "lack of success in recovering remittances referable to unidentified employees," and "[b]ecause we have ruled that the plaintiffs are entitled to some level of payment for this work," the

fee award "will have to be recalculated" on remand "after the appropriate amount of unpaid remittances is determined." *Id.* at 17a-18a. In light of the remand for recalculation of attorney's fees, the First Circuit dismissed petitioners' cross-appeal without prejudice. *Id.* at 18a n.7, 19a.

REASONS FOR GRANTING THE PETITION

Twenty-five years ago, in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), this Court unanimously held that a district court's decision on the merits that left unresolved a request for statutory attorney's fees was a "final decision" under 28 U.S.C. § 1291 even if the law regarded the fee award as part of the "merits." In this case, the First Circuit held that a district court's decision on the merits that left unresolved a request for *contractual* attorney's fees was *not* a "final decision" under Section 1291 precisely *because* the law regarded the fee award as part of the "merits."

The First Circuit's decision further deepens an entrenched, longstanding, and acknowledged post-*Budinich* circuit conflict. The decision below is irreconcilable with *Budinich*, which squarely rejected the "merits"/"nonmerits" distinction, and is therefore wrong. The question whether a contractual fee award is always, sometimes, or never collateral to the merits is a recurring and important one. And this case is an ideal vehicle for deciding it, because respondents' appeal will fail in its entirety if our position on finality is adopted. Certiorari should be granted.

A. There Is A Circuit Conflict

Nine of the thirteen circuits have addressed the question whether a claim for contractual attorney's

fees is collateral, such that a district court's decision on the merits that leaves the fee claim unresolved is final. Four circuits, including the First Circuit here, have held that such a claim is *sometimes* collateral. One circuit has held that it is *never* collateral. And four circuits have held that it is *always* collateral. This conflict has been acknowledged by multiple circuits, on different sides of the split, including the First Circuit below.

1. Four circuits have held that a contractual fee award is *sometimes* collateral

In this case the First Circuit held that a contractual attorney's fee award may or may not be collateral, depending on the nature of the fees. The Third, Fourth, and Eighth Circuits have reached the same conclusion post-*Budinich*.

First Circuit. In the decision below, the First Circuit recognized that the question whether *Budinich* applies to contractual attorney's fees has "divided" the circuits, which are in "disarray" on the issue. App., *infra*, 2a, 6a. As the First Circuit explained, the Second, Fifth, Seventh, and Ninth Circuits "have held that *Budinich* applies to *all* claims for attorneys' fees," whereas the Fourth, Eighth, and Eleventh Circuits "have held, on various rationales, that contractual claims for attorneys' fees may fall beyond the *Budinich* line." *Id.* at 6a-7a (emphasis added). Joining the latter group, the First Circuit held that *Budinich* does not apply when contractual fees are "an element of damages" and therefore "part of the merits of the[] contract claim." *Id.* at 8a-9a. The First Circuit undertook an analysis of the contract at issue here, as well as respondents' claim under it, *ibid.*, and determined that, in this case, the at-

torney's fees are damages and thus "beyond the line drawn by the *Budinich* Court," *id.* at 9a.

Third Circuit. While the First Circuit believed that the Third Circuit "has put a foot in each camp," App., *infra*, 7a, the better reading of that court's decisions is that it has adopted a rule that is similar (though not identical) to the First Circuit's. In the Third Circuit, an unresolved claim for attorney's fees is not collateral, and therefore prevents an otherwise final judgment from being final, if the requested fees are based on a contract and "an integral part of the contractual relief sought." *Gleason* v. *Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001). That court has characterized this rule as an "exception" to the holding of *Budinich*. *Local Union No. 1992 of Int'l Bhd. of Elec. Workers* v. *Okonite Co.*, 358 F.3d 278, 287 n.13 (3d Cir. 2004). It is true, however, that the Third Circuit has reached different results in applying the rule to the facts of particular cases. See, *e.g.*, *Vargas* v. *Hudson Cnty. Bd. of Elections*, 949 F.2d 665, 669-670 (3d Cir. 1991) (integral part); *Ragan* v. *Tri-County Excavating, Inc.*, 62 F.3d 501, 505 (3d Cir. 1995) (integral part); *Gleason*, 243 F.3d at 138 (not an integral part); *Am. Soc'y for Testing & Materials* v. *Corrpro Cos.*, 478 F.3d 557, 570 (3d Cir. 2007) (not an integral part).

Fourth Circuit. In *Carolina Power & Light Co.* v. *Dynegy Marketing & Trade*, 415 F.3d 354 (4th Cir. 2005), a decision that the First Circuit followed here, App., *infra*, 8a, the Fourth Circuit found that an order that did not resolve a request for contractual attorney's fees was not an appealable final decision, but the three members of the panel each employed a different rationale in reaching that result.

The lead opinion, by Judge Niemeyer, held that "application of *Budinich*" leads to the conclusion that an unresolved issue of contractual attorney's fees prevents an "order from being a final judgment" when the fees "would be awarded as part of the damages for [the] breach of contract claim." *Carolina Power & Light*, 415 F.3d at 360. Judge Niemeyer engaged in a detailed analysis of "the contract between the parties" and determined that, "[i]n the case before us," the attorney's fees were an element of damages and therefore not collateral. *Id.* at 359. Citing decisions of the Fifth and Ninth Circuits, Judge Niemeyer acknowledged that "the desirability of maintaining a brighter-line jurisdictional rule * * * has led more than one of our sister circuits to treat contractual awards of attorneys fees as collateral" without regard to "whether the contract at issue provided such awards as an element of damages or as costs to the prevailing party." *Id.* at 362. Judge Niemeyer noted, however, that the Eighth and Eleventh Circuits have rejected that view. *Ibid.*

In a concurring opinion, Judge Wilkinson articulated a narrower rule. He would treat a contractual fee award as collateral, not only when it is clearly and solely an award of "costs" to the prevailing party, but also when (1) the contract is "ambiguous" as to whether fees "are remedial, i.e., an element of damages, or, instead, are to be awarded to a prevailing party as costs of the underlying action" or (2) the contract suggests that "the attorneys' fees are a hybrid of both damages and costs." *Carolina Power & Light*, 415 F.3d at 363. Based on his own analysis of the contractual language, Judge Wilkinson determined that, "[i]n this case, the contract is perfectly clear that the attorneys' fees are a part of damages" alone and therefore not collateral. *Id.* at 362. Judge

Wilkinson recognized, however, that the Fifth, Seventh, and Ninth Circuits have held that awards based on "contractual attorneys' fees provisions are *always* collateral." *Id.* at 363-364 (emphasis added).

In the third opinion, concurring in the result, Judge Widener endorsed a rule that was *broader* than the one adopted by Judge Niemeyer. He would have applied the Eleventh Circuit's rule: that an order leaving unresolved "a request for attorneys' fees pursuant to a contractual clause" is *never* final. *Carolina Power & Light*, 415 F.3d at 364 (internal quotation marks omitted).

Eighth Circuit. In *Justine Realty Co.* v. *American National Can Co.*, 945 F.2d 1044 (8th Cir. 1991), the Eighth Circuit, like the First Circuit below, held that contractual attorney's fees are not collateral, and fall outside *Budinich*'s "bright-line rule," if they "are substantively part of a plaintiff's compensatory damage" and thus "go to the merits of the claim." *Id.* at 1047-1048. The panel was divided, however, on whether the fees at issue in that case were of that type. Whereas the majority determined that the fees went to "the merits of [the] claim of breach of the contract," *id.* at 1048, the dissent, based on a different reading of the same record, believed that the fees related to "the contractual dispute that was tried in the District Court and with respect to which that court entered judgment," *id.* at 1049 (Bowman, J., dissenting).

2. One circuit has held that a contractual fee award is *never* collateral

Like the First, Third, Fourth, and Eighth Circuits, the Eleventh Circuit has held that *Budinich*'s rule—that attorney's fees awards are collateral—

does not apply to fees that are based on a contract. Unlike those circuits, however, the Eleventh Circuit has held that contractual fee awards are *never* collateral.

In *Brandon, Jones, Sandall, Zeide, Koh, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349 (11th Cir. 2002) (per curiam), the Eleventh Circuit articulated its rule as follows: "In this Circuit, a request for attorneys' fees pursuant to a contractual clause is considered a substantive issue; and an order that leaves a substantive fees issue pending cannot be 'final.'" *Id.* at 1355. This rule applies to *all* contractual fee awards, even those that might be deemed collateral under the decisions of the First, Third, Fourth, and Eighth Circuits. *Adeduntan* v. *Hospital Authority of Clarke County*, 249 F. App'x 151 (11th Cir. 2007) (per curiam), for example, involved a contractual "prevailing party" provision, see *id.* at 153, and yet the Eleventh Circuit concluded that the district court's decision on the merits was not final because the amount of fees had not been determined, *id.* at 152-155. Cf. *Gleason*, 243 F.3d at 137-138 (Third Circuit decision finding award under contract's "prevailing party" provision collateral).

In *Adeduntan*, the Eleventh Circuit said that it was "sympathetic" to the argument that its longstanding rule had been "undermined" by *Budinich*, but felt bound by its prior decision in *MedPartners*, which postdated *Budinich* and remains "the law of this circuit." 249 F. App'x at 154. "For better or for worse," the Eleventh Circuit said, and "whether wrong or right," *MedPartners* "is binding panel precedent that we must follow," at least until "the Supreme Court[] decides otherwise." *Id.* at 154-155.

3. Four circuits have held that a contractual fee award is *always* collateral

In disagreement with the First, Third, Fourth, and Eighth Circuits, as well as with the Eleventh, the Second, Fifth, Seventh, and Ninth Circuits have held that a contractual fee award, like a statutory fee award, is *always* collateral under *Budinich*. This case would therefore have been decided differently in those circuits.

Second Circuit. In *O & G Industries, Inc.* v. *National Railroad Passenger Corp.*, 537 F.3d 153 (2d Cir. 2008), the district court entered judgment and decided that an award of contractual attorney's fees was warranted, but did not determine the amount of fees prior to the appeal of the judgment. *Id.* at 158-159. Like the First Circuit in the decision below, App., *infra*, 8a-9a, the Second Circuit characterized the fees at issue as "a contractually stipulated element of damages." 537 F.3d at 167 (internal quotation marks omitted). Unlike the First Circuit, however, the Second Circuit held that, under "the 'bright-line rule' enunciated by the Supreme Court in *Budinich*," the district court's failure to determine the fee amount "does not impair the finality" of its judgment. *Id.* at 168. The Second Circuit observed that "[s]ome of our pre-*Budinich* precedent might be read to support the proposition that the non-finality of an award of attorneys' fees sought as an element of contractual damages renders non-appealable the entire judgment in which such award is incorporated." *Id.* at 168 n.11. But the Second Circuit rejected that precedent, "heed[ing] the * * * admonition in *Budinich*" that no "different treatment" should be accorded to "attorney's fees deemed part of the merits recovery" and "abid[ing] by" *Budinich*'s "uniform

rule." *Ibid.* (quoting *Budinich*, 486 U.S. at 202); see also *McGuire* v. *Russell Miller, Inc.*, 1 F.3d 1306, 1315 (2d Cir. 1993) ("a judgment is 'final' even though the court has yet to determine attorneys' fees, and even if those fees are sought pursuant to a contract" (citing *Budinich*)). The Second Circuit's categorical rule means that respondents' appeal in this case would have been dismissed as untimely insofar as it challenged the district court's order on remittances if the case had been filed, not in Massachusetts, as it was, but across the border in New York, Connecticut, or Vermont.

Fifth Circuit. In *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197 (5th Cir. 1990), as in this case, App., *infra*, 3a, 8a-9a, the plaintiff filed suit "to recover [a] deficiency [under a contract] and attorneys' fees." 902 F.2d at 1198. The district court entered judgment on the deficiency but did not rule on the fee request. *Id.* at 1199. The defendants argued that the judgment was not final, and thus that the notice of appeal filed more than 30 days after the judgment was not untimely, because "attorney's fees arising out of a contract are a part of the merits of the case." *Ibid.* The Fifth Circuit held that this claim was foreclosed by *Budinich*. While *Budinich* arose "in a situation where attorneys' fees were provided by *statute*," the Fifth Circuit explained, "it is clear from its sweeping language that *Budinich* establishes a 'bright line' rule that applies with equal force where attorneys' fees are sought under a *contract*." *Ibid.*; see also *Resolution Trust Corp.* v. *Marshall*, 939 F.2d 274, 280 n.2 (5th Cir. 1991) (per curiam) ("We extended *Budinich* to awards of attorneys fees authorized by contract in *First Nationwide Bank* * * *.").

Seventh Circuit. In *Continental Bank, N.A.* v. *Everett*, 964 F.2d 701 (7th Cir. 1992) (Easterbrook, J.), as in this case, App., *infra*, 8a-9a, the contracts on which suit was brought entitled the plaintiff "to recover the attorneys' fees incurred in the course of collection." 964 F.2d at 702. The district court entered judgment for the plaintiff on the contracts (in that case, guarantees), "but put off determining the precise amount payable as fees." *Ibid.* The Seventh Circuit held that it had jurisdiction to review the judgment despite the lack of a ruling on fees. Citing *Budinich*, the court explained that "[a]n open issue about legal fees, *contractual or otherwise*, does not affect our jurisdiction to resolve the appeal on the guarantees." *Ibid.* (emphasis added). The Seventh Circuit acknowledged, but declined to follow, the Eighth Circuit's contrary holding in *Justine Realty*. *Id.* at 703; see also *In re Stoecker*, 5 F.3d 1022, 1026 (7th Cir. 1993) (Posner, J.) ("The determination of attorney's fees is a collateral matter which, even when as in this case they are claimed by virtue of contract rather than statute, does not affect the appealability of the underlying claim." (citing *Budinich*)).

Ninth Circuit. In *United States ex rel. Familian Northwest, Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952 (9th Cir. 1994), the district court entered judgment in the plaintiff's favor and then awarded it contractual attorney's fees in a separate order. *Id.* at 954. The defendant filed a motion to alter or amend the judgment within 10 days of the latter order but not of the former (10 days being the applicable deadline for such a motion at the time). *Ibid.* The Ninth Circuit held that the motion was untimely under *Budinich*, because the judgment was final when the first order was entered. *Id.* at 954-955. It rejected the defendant's proffered "distinction between fees

authorized by [statute] and those authorized by contract." *Id.* at 954. It also "decline[d] to follow" the Eighth Circuit's decision in *Justine Realty*, which, in the Ninth Circuit's view, "ignores *Budinich*'s emphasis on the need for a bright-line rule in order to determine appealability." *Id.* at 955. The Ninth Circuit noted that "[t]he Eighth Circuit's holding in *Justine Realty* was considered and rejected by the Seventh Circuit in *Continental Bank*," and the Ninth Circuit "reject[ed] it as well." *Ibid.*[2]

B. The Decision Below Is Incorrect

1. The rule adopted by the First Circuit below, and the identical or similar rules adopted by the Third, Fourth, and Eighth Circuits, are fundamentally inconsistent, not only with decisions of four other circuits, but also with *Budinich* itself. Indeed, they conflict with *Budinich* in several related ways. The rules are accordingly wrong.

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[2] One other circuit—the Tenth—has held that, under *Budinich*, an award of contractual "attorney fees *for the litigation at hand* is a collateral issue," *McKissick* v. *Yuen*, 618 F.3d 1177, 1197 (10th Cir. 2010), a position with which, in that court's view, all circuits to consider the question but the Eleventh would agree, *id.* at 1197-1198. While it rejected the position of the Eleventh Circuit, *id.* at 1197-1198 & n.11, the Tenth Circuit had no occasion to decide whether other types of contractual fee awards are collateral. It therefore did not choose sides in the conflict between the Third, Fourth, and Eighth Circuits, on the one hand, and the Second, Fifth, Seventh, and Ninth, on the other. The D.C. and Sixth Circuits have not addressed the question presented here either, but district courts in those circuits have followed the Fourth Circuit's decision in *Carolina Power & Light*. See *Qatar Nat'l Bank* v. *Winmar, Inc.*, 831 F. Supp. 2d 159, 162-163 (D.D.C. 2011); *Lynch* v. *Sease*, 2006 WL 1206472, at *4 (E.D. Ky. May 2, 2006).

First, the "critical question" in deciding whether *Budinich*'s holding applies to contractual attorney's fees in a particular case, according to the First Circuit, is whether the claim for fees "is part of the merits." App., *infra*, 8a; see also *Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 137 (3d Cir. 2001) (claim for fees is not collateral when it is "part of the contractual damages at issue on the merits"); *Carolina Power & Light Co.* v. *Dynegy Mktg. & Trade*, 415 F.3d 354, 362 (4th Cir. 2005) (claim for fees is not collateral when it "goes directly to the merits of the case"); *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1048 (8th Cir. 1991) (claim for fees is not collateral when it is "inherent in the merits of [the] claim"). But *Budinich* squarely rejected the distinction between attorney's fees that are part of the "merits" and those that are not. 486 U.S. at 201. It explained that "preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits'" is not "of importance" under the "practical approach" that must be employed when considering issues of finality and appealability. *Id.* at 202. What *is* important, the Court made clear, is that "no interest pertinent to § 1291 is served," and that "significant interest[s]" are "disserved," by treating "merits" and "nonmerits" fee awards differently. *Ibid.*

Second, in the Fourth Circuit decision that the First Circuit followed, the requested attorney's fees were deemed "merits" rather than "nonmerits" fees at least in part because of how the contract at issue characterized them (in that case, as "damages"). *Carolina Power & Light*, 415 F.3d at 359; see also *id.* at 363 (Wilkinson, J., concurring). But *Budinich* held that the finality of a judgment "should not turn

upon the characterization of those fees" by the law that authorizes them. 486 U.S. at 201.

Third, application of the First Circuit's rule demands a fact-intensive analysis of both the specific contract at issue and the underlying claim, to determine whether attorney's fees are part of the "merits" or not in each individual case. See App., *infra*, 8a-9a; see also *Gleason*, 243 F.3d at 137-138; *Carolina Power & Light*, 415 F.3d at 359; *Justine Realty*, 945 F.2d at 1048. But *Budinich* made clear that the finality of a decision should not have to be assessed on a case-by-case basis, expressly rejecting a rule that would "require[] the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known." 486 U.S. at 202. What was necessary instead, the Court said, was a "uniform" and "bright-line" rule, *ibid.*, of which the First Circuit's case-by-case approach is the antithesis.

Fourth, the First Circuit's rule is difficult to apply. As one of the judges who joined the Fourth Circuit decision candidly acknowledged, contractual language "will often be ambiguous" as to whether attorney's fees are part of the "merits" or not, and it will sometimes suggest that fees "are a hybrid" of both "merits" and "nonmerits" relief. *Carolina Power & Light*, 415 F.3d at 363 (Wilkinson, J., concurring). (Ironically, this judge's proposed solution to the problem was not to reject the rule adopted by the Fourth Circuit in favor of that of the Fifth, Seventh, and Ninth, but rather to propose an even more complicated one, according to which contractual fees must also be treated as collateral in "ambiguous or hybrid cases." *Ibid.*)

More fundamentally, it is not at all apparent what the standard is for determining whether an award of contractual fees is a "merits" or "nonmerits" award in the first place. In the decision below, the First Circuit found it "[p]ertinent[]" that respondents "sought recovery of both unpaid remittances and attorneys' fees" in their complaint, App., *infra*, 3a, and that they "consistently have asserted an entitlement" to fees "[t]hroughout the litigation," *id.* at 8a-9a. The court did not explain, however, why the same request for fees could be a "nonmerits" request if made later in a litigation but a "merits" request if made earlier. In any case, it is hardly unusual for a plaintiff to allege an entitlement to *statutory* attorney's fees in a complaint, and such fees are indisputably collateral under *Budinich*.

The First Circuit also distinguished between fees for "collecting payments due" (which it deemed "merits" fees) and those for a "prevailing party" (which it did not). App., *infra*, 9a (quoting collective bargaining agreement). But the court did not say whether that is a definition or merely an example. In any event, the distinction provides scant justification for departing from the "practical approach" of *Budinich*, 486 U.S. at 202, particularly when one considers that respondents were "able to satisfy the condition precedent to recovering legal costs—that is, that [petitioners] failed * * * to deliver [payments]—in exactly the circumstances in which [respondents] 'prevail[ed]' [on their] claim," *Carolina Power & Light*, 415 F.3d at 361-362, and that, in almost all cases, including this one, see Dist. Ct. Dkt. 69, the attorney's fees sought were "incurred mostly in connection with th[e] litigation," *Carolina Power & Light*, 415 F.3d at 360.

The impracticability of the First Circuit's rule is confirmed by the fact that the Third Circuit has reached conflicting results in applying its even murkier "integral part of the contractual relief sought" rule in different cases, and also by the fact that judges of the Eighth Circuit reached conflicting results *in the same case*. See *supra* Point A.1. Because it is hard to apply, the First Circuit's rule—like the equally- or even-more-hard-to-apply rules of other circuits—severely undermines the core interests on which the holding of *Budinich* rests: "preservation of operational consistency and predictability in the overall application of § 1291," and the need for "[t]he time of appealability," which has "jurisdictional consequences," to "above all be clear." 486 U.S. at 202.

Finally, the First Circuit's decision ultimately depends upon a particular understanding of *Budinich*: that, although "attorney's fees *generally* should be considered a collateral matter, they may *sometimes* be considered as part of the merits." App., *infra*, 7a-8a (emphasis added); see also *Justine Realty*, 945 F.2d at 1048. In fact that is the very opposite of what *Budinich* means. The whole point of *Budinich*'s "bright-line rule," 486 U.S. at 202, is that, precisely *because* attorney's fees *generally* are collateral, they *always* should be treated as collateral in determining whether a prior decision is final, *even though* attorney's fees *sometimes* are part of the merits. This Court *rejected* the idea that "the general status of attorney's fees for § 1291 purposes must be altered" when the "law authorizing them" requires that they be treated as "part of the merits" in a particular case. *Id.* at 201. Yet that is the very premise on which the First Circuit's decision rests.

2. The Eleventh Circuit would have reached the same result as the First Circuit in this case, but on a different ground: that a contractual fee award is *never* collateral (even though, under *Budinich*, a statutory fee award *always* is). That rule is at least as misguided as the First Circuit's.

For one thing, the Eleventh Circuit's rule is also inconsistent with *Budinich*, because it too rests on a distinction between "merits" and "nonmerits" fees—with the difference that *all* contractual fees are "merits" fees and all statutory fees (per *Budinich*) are not. For another, as each of the other circuits to consider the question has recognized, it is simply not the case that all contractual fees go to the "merits" of a claim, even assuming that some do—the most obvious counterexample being fees that are based on a "prevailing party" provision. Finally, the Eleventh Circuit cannot account for another category of "hybrid" cases—those in which fees are sought under both a contract *and* a statute. The Eleventh Circuit's rule is accordingly untenable, as that court itself all but acknowledged in *Adeduntan*.

C. The Question Presented Is Important

More than 30,000 contract actions are filed in federal court each year. *Judicial Business of the United States Courts, 2011 Annual Report of the Director* 16 (statistics for 2007-2011). And that number does not include the statutory cases, like this one, that ultimately rest on a claim of breach of contract. See, *e.g.*, 29 U.S.C. § 185(a) ("[s]uits for violation of contracts between an employer and a labor organization representing employees"). A substantial proportion of the contracts in these common-law and statutory cases include attorney's fees provisions, which are "commonplace in commercial and business

transactions." 1 Robert L. Rossi, *Attorney's Fees* § 9:1 (3d ed. 2012).

Indeed, both the prevalence and the variety of such provisions are amply demonstrated by the court of appeals cases discussed in this petition alone. The contracts at issue just in those cases include collective bargaining agreements and other union-related contracts, *e.g.*, App., *infra*, 2a-3a; *Ragan* v. *Tri-County Excavating, Inc.*, 62 F.3d 501, 505 (3d Cir. 1995); merger agreements and stock purchase agreements, *e.g.*, *McGuire* v. *Russell Miller, Inc.*, 1 F.3d 1306, 1309 (2d Cir. 1993); *Gleason* v. *Norwest Mortg., Inc.*, 243 F.3d 130, 137-138 (3d Cir. 2001); indemnity agreements and settlement agreements, *e.g.*, *O & G Indus., Inc.* v. *Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 167 (2d Cir. 2008); *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1045 (8th Cir. 1991); credit agreements and similar contracts, *e.g.*, *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197, 1199 (5th Cir. 1990); *Cont'l Bank, N.A.* v. *Everett*, 964 F.2d 701, 702 (7th Cir. 1992); and employment agreements and separation agreements, *e.g.*, *McKissick* v. *Yuen*, 618 F.3d 1177, 1198 (10th Cir. 2010); *Adeduntan* v. *Hosp. Auth. of Clarke Cnty.*, 249 F. App'x 151, 153 (11th Cir. 2007) (per curiam). And that is just a representative sample. Attorney's fees provisions are also common in contracts for sale of real estate, leases, license agreements, construction contracts, and franchise agreements. 1 Rossi, *supra*, §§ 9:2, 9:17.

Because there are so many contract cases in federal court, because so many contracts include an attorney's fees provision, and because district courts often award attorney's fees "in a separate memorandum," App., *infra*, 38a, after entering judgment and

considering "briefing and documentation" on the fee issue, *Budinich*, 486 U.S. at 197, the question whether a district court's decision is "final" when it does not resolve a request for contractual attorney's fees is a recurring and important one. That conclusion is confirmed by the fact that almost all of the circuits have had occasion to address the question—some of them multiple times.

It also bears emphasis that this finality question can arise in a number of procedural settings. One of the most common is a case, like this, in which the district court issues a decision on the merits and then issues a separate decision on attorney's fees, and the question is whether the appeal came too late as to the merits decision. See also *Vargas* v. *Hudson Cnty. Bd. of Elections*, 949 F.2d 665, 667-668 (3d Cir. 1991). That was what happened in *Budinich* too. Another is when the district court issues a decision on the merits but does *not* issue a decision on attorney's fees, and the question is whether the appeal came too *early*. *E.g.*, *Carolina Power & Light Co.* v. *Dynegy Marketing & Trade*, 415 F.3d 354, 358 (4th Cir. 2005); *Brandon, Jones, Sandall, Zeide, Koh, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349, 1354-1355 (11th Cir. 2002) (per curiam). And there are still other contexts in which the finality question can affect the timeliness of an appeal post-*Budinich*. See *Justine Realty*, 945 F.2d at 1045-1047 (merits decision, then Fed. R. Civ. P. 59(e) motion seeking attorney's fees; issue was whether motion was proper Rule 59(e) motion that tolled time to appeal merits decision). The question can also affect proceedings in district court. See, *e.g.*, *United States ex rel. Familian Nw., Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 954 (9th Cir. 1994) (merits decision, then fee decision, then Fed. R. Civ. P. 59(e) mo-

tion addressed to merits; issue was whether motion was timely); *McKissick*, 618 F.3d at 1183-1184 (merits decision, then appeal, then fee decision; issue was whether district court had jurisdiction to award fees); *Qatar Nat'l Bank* v. *Winmar, Inc.*, 831 F. Supp. 2d 159, 161-164 (D.D.C. 2011) (merits decision without fee decision; issue was whether district court had authority to issue writs of attachment, execution, and garnishment).

Budinich emphasized the importance of certainty and predictability in this area of the law. 486 U.S. at 202-203. But the acknowledged "disarray" in the lower courts, App., *infra*, 6a, has led to *un*certainty and *un*predictability, not only within circuits but across them. As we have explained, moreover, the issue on which there is disarray can arise in a large number of cases, in a variety of factual and procedural contexts. This Court should restore order. It should provide the clarity and consistency demanded by the "very real interests," not only of parties to litigation, but also of "our judicial system." *Budinich*, 486 U.S. at 201 (internal quotation marks omitted).

D. This Case Is An Ideal Vehicle

This Court sometimes denies certiorari when the resolution of the question presented would be "irrelevant to the ultimate outcome of the case." Eugene Gressman *et al.*, *Supreme Court Practice* 248 (9th ed. 2007). This is not such a case. On the contrary, a grant of certiorari and reversal not only might but *would* be outcome-determinative on *all* the issues in respondents' appeal to the First Circuit. This case is therefore an unusually good vehicle for resolving the circuit conflict on whether an outstanding claim for contractual attorney's fees can render an otherwise-final decision non-final.

Respondents raised three issues in their appeal, and the First Circuit decided each of them in respondents' favor. It held that respondents' appeal was timely, not only as to attorney's fees, but also as to remittances. App, *infra*, 5a-9a. It held that respondents are entitled to additional remittances for unidentified employees. *Id.* at 9a-17a. And it held that, because respondents are entitled to additional remittances, their attorney's fees should be recalculated. *Id.* at 17a-18a.

If this Court grants review and adopts the jurisdictional rule we advocate, all three of these issues will necessarily be decided *against* respondents. There will be no jurisdiction to review the district court's order on remittances, because the appeal will be untimely as to that issue. The district court's order on remittances, which found that respondents are not entitled to additional ones for unidentified employees, will therefore stand. And respondents' challenge to the attorney's fees, which depended upon an entitlement to additional remittances, see Resp. C.A. Br. 47-48; Resp. C.A. Reply Br. 13, will necessarily fail.

It is for this reason, among others, that this case is a far better vehicle than *Adeduntan* v. *Hospital Authority of Clarke County*, 554 U.S. 902 (2008) (No. 07-1079), in which certiorari was sought on a similar issue and denied. In that case the issue was *not* outcome-determinative, because the appeal had been "dismissed as premature" and the petitioners were able to "file another one after the district court entere[d] an order determining the amount of fees." *Adeduntan* v. *Hosp. Auth. of Clarke Cnty.*, 249 F. App'x 151, 155 (11th Cir. 2007) (per curiam). Unlike in this case, therefore, a decision by this Court in

Adeduntan would have affected only *when* the appeal could be taken, not *whether* it could be. See also Br. in Opp. at 7-17, *Adeduntan*, 554 U.S. 902 (No. 07-1079), 2008 WL 2066099 (arguing, in addition, that case had unique facts and that there were alternative grounds for decision).

Similarly, the fact that the First Circuit remanded for further proceedings here is not a reason to deny review. This is not a case in which petitioners might prevail at a later stage or on a different ground, since the First Circuit has determined that respondents are entitled to additional remittances (and perhaps to additional attorney's fees as well). App., *infra*, 9a-18a. This Court has frequently granted certiorari to decide an issue of appealability in cases in which the court of appeals exercised jurisdiction and remanded and the petitioner *could* potentially have prevailed on remand. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009); *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Osborn* v. *Haley*, 549 U.S. 225 (2007); *Holmes Grp., Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002). There is even greater reason to grant review in this case, where there is no such potential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2013

APPENDICES

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 11-1944

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS ET AL.,

Plaintiffs, Appellants,

v.

RAY HALUCH GRAVEL CO.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Michael A. Ponsor, U.S. District Judge]

Before

Thompson, Selya and Dyk,*
Circuit Judges.

Kenneth L. Wagner, with whom Blitman & King LLP was on brief, for appellants.

José A. Aguiar, with whom Doherty, Wallace, Pillsbury and Murphy, P.C. was on brief, for appellee.

September 12, 2012

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* Of the Federal Circuit, sitting by designation

SELYA, Circuit Judge. This appeal requires us to resolve two issues of first impression in this circuit. The first, which has divided our sister circuits, relates to judgment finality. The second relates to what happens when an employer fails to keep appropriate records concerning work covered by the benefit-remittance provisions of a collective bargaining agreement. After careful consideration, we hold that the appeal is timely as to all issues and that both the judgment on the benefit-remittance claim and the judgment awarding attorneys' fees are open to appellate review. We further hold that these judgments must be vacated. Consequently, we remand to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

We briefly rehearse the background and the travel of the case, reserving more exegetic detail for our treatment of particular issues.

The defendant, Ray Haluch Gravel Co., is a landscape supply company in Ludlow, Massachusetts.[1] Over time, its primary operations have morphed from site work and excavation to the sale of landscaping products — but it continues to perform both types of work.

Beginning in 1988, the defendant entered into a series of collective bargaining agreements with the International Union of Operating Engineers, Local 98 (the Union), which maintains a hiring hall where

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[1] There is some confusion in the record as to both the number of defendants originally sued and the correct corporate name of the employer (which is, for all practical purposes, the sole defendant). For simplicity's sake, we treat Ray Haluch Gravel Co. as the employer and defendant.

employers may either seek Union referrals or directly hire workers. The collective bargaining agreement at issue here (the CBA) took effect on May 1, 2005 and expired on April 30, 2011. Under it, the defendant remitted contributions to an array of Union-affiliated benefit funds (the Funds) primarily on behalf of a single employee: Todd Downey. All of the Funds are employee benefit plans regulated under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461.

In 2007, the Funds commissioned audits of the defendant's books. Armed with the completed audits, they demanded additional remittances for previously unreported work allegedly covered by the CBA. The defendant demurred, and the Funds sued the defendant in the federal district court.[2] Pertinently, their complaint sought recovery of both unpaid remittances and attorneys' fees.

Following a three-day bench trial, the lower court took the matter under advisement and requested briefs (covering, inter alia, the claim for attorneys' fees). In line with this briefing order, the plaintiffs — having been granted extra time for this purpose — filed a motion for attorneys' fees.

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[2] The Funds include Central Pension Fund of the International Union of Operating Engineers and Participating Employers; International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds; Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund; and International Union of Operating Engineers Local 98 and Employers Cooperative Trust. Each of the Funds sued through its appropriate fiduciary or fiduciaries. The Union itself is also a named plaintiff.

On June 17, 2011, the district court issued an order resolving the claim for unpaid remittances. It awarded the plaintiffs $26,897.41 referable to covered work performed by a specific employee (Martin Jagodowski), but denied recovery for any other work. *Int'l Union of Oper'g Eng'rs, Local 98 Health & Welfare, Pension & Annuity Funds* v. *Ray Haluch Gravel Co.* (*Haluch I*), 792 F. Supp. 2d 129, 138 (D. Mass. 2011). The court directed the entry of judgment for the plaintiffs,[3] explaining that it would rule on the claim for attorneys' fees in a separate decision. *Id.*

On July 25, 2011, the court resolved the claim for attorneys' fees, awarding the plaintiffs $34,688.15. *Int'l Union of Oper'g Eng'rs, Local 98 Health & Welfare, Pension & Annuity Funds* v. *Ray Haluch Gravel Co.* (*Haluch II*), 792 F. Supp. 2d 139, 143 (D. Mass. 2011). At the end of its order, the court noted for the first time that "[t]his case may now be closed." *Id.* On August 15, 2011, the plaintiffs appealed the decisions in both *Haluch I* and *Haluch II*.

II. ANALYSIS

We subdivide our analysis into three segments. First, we discuss the timeliness of the appeal vis-à-vis the lower court's decision in *Haluch I*. Second, we consider the plaintiffs' plaint that the district court misconstrued the CBA and, in the bargain, did not appropriately resolve the claim for unpaid remittances. Finally, we turn to the claim for attorneys' fees.

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[3] The court did not direct the clerk to enter this judgment as a partial final judgment. *See* Fed. R. Civ. P. 54(b).

A. Timeliness of the Appeal.

The timeliness of an appeal in the federal courts is governed by the provisions of Rule 4 of the Federal Rules of Appellate Procedure. With narrow exceptions not relevant here (such as when the federal government is a party), an appeal in a civil case must be filed within either thirty days of the entry of a final judgment or thirty days after the district court's denial of one of several post-judgment motions. Fed. R. App. P. 4(a)(1)(A), (a)(4). These time limits are mandatory and jurisdictional. *See Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988).

In the case at hand, the plaintiffs filed their notice of appeal within thirty days following the district court's entry of judgment with respect to the claim for attorneys' fees. This was, however, more than thirty days after the district court had entered its previous and separate judgment as to the claims for unpaid remittances. The question reduces, then, to whether the notice of appeal was timely as to the first judgment. This, in turn, requires us to determine whether the first judgment was a final judgment. *See* 28 U.S.C. § 1291 (conferring on the courts of appeals jurisdiction over "final decisions of the district courts").

The point of embarkation for this inquiry is *Budinich*, in which the plaintiff, after prevailing on an employment claim, sought to recover counsel fees under a state fee-shifting statute. 486 U.S. at 197. The plaintiff, who was dissatisfied with the outcome of the case on the merits, did not file a notice of appeal until after the district court resolved the claim for attorneys' fees. That notice was filed more than thirty days after the entry of judgment on the merits. *See id.* at 197–98.

The *Budinich* Court ruled that the appeal was untimely as to the merits of the employment claim. *See id.* at 199–203. It started with the conventional wisdom that a final decision under section 1291 is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 199 (internal quotation marks omitted). It then noted that, in general, "a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Id.* at 200. In the usual case, "[s]uch an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action." *Id.* The judgment on the merits was, therefore, final when rendered — the fees issue was wholly collateral — and the appeal should have been taken within thirty days thereafter. *Id.* at 203.

The defendant insists that *Budinich* is controlling here: in its view, the *Budinich* Court crafted a bright-line rule. But this characterization begs the question of where and how the line should be drawn. We must explore that conundrum.

The decisions of the courts of appeals on this point are in disarray. Some have held that *Budinich* applies to all claims for attorneys' fees. *See, e.g., O & G Indus., Inc.* v. *Nat'l R.R. Pass. Corp.*, 537 F.3d 153, 167–68 & n.11 (2d Cir. 2008); *United States ex rel. Familian Nw., Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 954–55 (9th Cir. 1994); *Cont'l Bank, N.A.* v. *Everett*, 964 F.2d 701, 702 (7th Cir. 1992); *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197, 1199–1200 (5th Cir. 1990). Other courts have held, on various rationales, that contractual claims for attorneys' fees may fall beyond the *Budinich* line. *See Carolina Power & Light Co.* v. *Dynegy*

Mktg. & Trade, 415 F.3d 354, 356 (4th Cir. 2005) (concluding that a claim for attorneys' fees "not limited to expenses incurred during the underlying litigation is an element of damages" and that, therefore, "a judgment that leaves open such a claim is not final and appealable"); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349, 1355 (11th Cir. 2002) (per curiam) (holding that "a request for attorneys' fees pursuant to a contractual clause is considered a substantive issue; and an order that leaves a substantive fees issue pending cannot be 'final' "); *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1047–49 (8th Cir. 1991) (explaining that attorneys' fees are part of the merits when sought under contract for, in part, pre-litigation costs incurred as a result of breach). At least one court has put a foot in each camp. *See Gleason* v. *Norwest Mortg., Inc.*, 243 F.3d 130, 137-38 (3d Cir. 2001) (concluding that certain contract-based attorneys' fees are outside the scope of *Budinich* but finding "no difference . . . for § 1291 finality purposes, between payment of attorneys' fees to a prevailing party under statute and payment . . . under the contract"). We have not yet had occasion to pass upon this issue.

We do not believe that *Budinich* should be read mechanically to apply to all claims for attorneys' fees, whatever their genesis. Such a mechanical reading overlooks the Supreme Court's acknowledgment that "[i]f one were to regard the demand for attorney's fees as *itself* part of the merits, the . . . . merits would then not have been concluded, and § 1291 finality would not exist." *Budinich*, 486 U.S. at 200 (emphasis in original). This acknowledgment unmistakably signals that, although the *Budinich* Court determined that attorneys' fees generally should be

considered a collateral matter, they may sometimes be considered as part of the merits. *Cf. Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 175–77 (1989) (holding that prejudgment interest is part of the merits, distinguishing *Budinich*, and explaining that "as a general matter, a request for attorney's fees is not part of the merits of the underlying action because such fees are not part of the compensation for the plaintiff's injury but traditionally have been regarded as an element of costs awarded to the prevailing party").

Where, as here, an entitlement to attorneys' fees derives from a contract rather than from a statute, the critical question is whether the claim for attorneys' fees is part of the merits. In this instance, the plaintiffs brought suit, at least in part, to enforce certain provisions of the CBA. That agreement provided for the payment of attorneys' fees as an element of damages in the event of a breach. Throughout the litigation, the plaintiffs, pursuant to the terms of the CBA, sought to recoup the attorneys' fees incurred as part of their collection efforts. These included fees for legal services rendered prior to suit. Viewed through this prism, the attorneys' fees must be considered an element of the plaintiffs' contractual damages. It follows that when the district court entered judgment only for the unpaid remittances and explicitly left open the claim for attorneys' fees, the damages award was incomplete and the judgment was not final. A judgment as to liability that does not resolve the question of damages is not a final judgment within the purview of 28 U.S.C. § 1291 because the assessment of damages is an element of the cause of action itself. *See Carolina Power & Light*, 415 F.3d at 358; *Ragan* v. *Tri-Cnty. Excav'g, Inc.*, 62 F.3d 501, 505–06 (3d Cir. 1995).

In an effort to blunt the force of this reasoning, the defendant argues that, under the CBA, only a prevailing party would be entitled to attorneys' fees and, thus, this case is on a par with *Budinich*. This purported distinction is of little moment here. The CBA states in pertinent part that "[a]ny costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting [e]mployer." There is no requirement that suit be brought and, thus, there is no requirement that the Funds be prevailing parties. For example, the quoted provision would apply when a fund attempts to collect contributions from an employer, who, after a period of recalcitrance, yields to the fund's demands before suit is brought.[4]

That ends this aspect of the matter. The plaintiffs consistently have asserted an entitlement to attorneys' fees under the CBA. Those fees are damages and, as such, are part of the merits of their contract claim. It follows, therefore, that they fall beyond the line drawn by the *Budinich* Court. Because no final judgment entered until the district court resolved the contract-based claim for attorneys' fees, the plaintiffs' appeal is timely as to all the issues raised.

B. Unpaid Remittances.

We turn next to the claim for unpaid remittances. Neither the district court's decision to order remittances referable to Jagodowski's work nor the amount of those remittances is contested on appeal. The plaintiffs argue, however, that the district court

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[4] The attorneys' fees at issue here graphically illustrate this point: they include remuneration for legal work performed before any formal litigation was commenced.

should have ordered additional payments with respect to certain unidentified employees.

Whether the defendant was required to remit certain payments is a matter of contract. *See Gastronomical Workers Union Local 610 & Metro. Hotel Ass'n Pension Fund* v. *Dorado Beach Hotel Corp.*, 617 F.3d 54, 62 (1st Cir. 2010). Federal common law supplies the substantive rules by which labor agreements are interpreted. *See Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985); *Sweeney* v. *Westvaco Co.*, 926 F.2d 29, 36 (1st Cir. 1991) (Breyer, C.J.). A special gloss applies: a court interpreting a collective bargaining agreement must take an industry-specific view, considering "the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Transp.-Commc'n Emps. Union* v. *Union Pac. R.R.*, 385 U.S. 157, 160–61 (1966); *see Senior* v. *NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 220–21 (1st Cir. 2006). We review the district court's findings of fact for clear error and its conclusions of law (including its interpretation of the CBA) de novo. *See Dist. Lodge 26, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO* v. *United Techs. Corp.*, 610 F.3d 44, 51 (2d Cir. 2010); *Smart* v. *Gillette Co. Long-Term Disab. Plan*, 70 F.3d 173, 178 (1st Cir. 1995).

"In construing the terms of contracts that are governed by federal common law, we are guided by common-sense canons of contract interpretation." *Smart*, 70 F.3d at 178 (internal quotation marks omitted). One such canon holds that contract language is normally considered ambiguous "where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable difference of opinion as to the meaning of the words em-

ployed and obligations undertaken." *Fashion House, Inc.* v. *K mart Corp.*, 892 F.2d 1076, 1083 (1st Cir. 1989). "If a contractual provision is not susceptible of reasonable but conflicting interpretations, it is not ambiguous." *Avery* v. *Hughes*, 661 F.3d 690, 694 (1st Cir. 2011). In the absence of an ambiguity, contractual language must be construed according to its plain and natural meaning. *Smart*, 70 F.3d at 178.

Three articles contained in the CBA are of particular pertinence here. Article I states that the CBA "shall apply to all work . . . in connection with all operations usually performed in the sand and gravel industry, described in Article IV." Article IV sets out various types of employee classifications. Article VI requires benefit-remittance payments "for each payroll hour . . . for each employee covered by this Agreement."

The district court concluded that the CBA was ambiguous as to "*how* employees [were] to be classified" and, relatedly, the extent to which an employer was required to make contributions under Article VI. *Haluch I*, 792 F. Supp. 2d at 136–37 (emphasis in original). In reaching these conclusions, the court relied heavily on the fact that Article IV was couched in terms of employee classifications, not work descriptions per se. *See id.* at 134-36.

We find the district court's interpretation insupportable. Its construction of the CBA undervalues the sensible rule forbidding the "balkanization of contracts for interpretive purposes." *Smart*, 70 F.3d at 179. By virtue of Article I, the CBA applies to covered work; that is, work "in connection with all operations usually performed in the sand and gravel industry." Article IV is couched in terms of employee classifications, but this compendium (for example,

the reference to "Maintenance Mechanic, Operators on shovels, cranes, drag-lines, bulldozers, plant operators, front end loaders, power leaders of all types and similar equipment") is obviously intended to describe covered work. By the same token, the text of Article VI ("for each payroll hour . . . for each employee covered by this Agreement") requires remittance for hours of covered work. Viewing these provisions in context and as a seamless whole, the only reasonable interpretation is that an employer must remit benefit payments for each hour of work covered by the CBA.

Ironically, the district court's resolution of the claim relating to Jagodowski's benefits fits hand in glove with this interpretation. The court determined that seventy-five percent of Jagodowski's time was spent "operating and repairing heavy equipment such as front-end loaders and bucket loaders" and, thus, came within the ambit of the CBA. *Haluch I*, 792 F. Supp. 2d at 136. We think that this determination, which is not challenged on appeal, indicates the lack of ambiguity and bolsters our construction of the CBA.

The absence of any material ambiguity is of decretory significance here. Under both federal common law and labor law, an unambiguous contract must be enforced according to its tenor. *Senior*, 449 F.3d 219. Plain meaning prevails.[5]

This plain-meaning interpretation casts light on the plaintiffs' claim that they are entitled to remit-

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[5] Because the language of the CBA is sufficiently clear, we eschew any further inquiry into the broader context surrounding its execution. *See Senior*, 449 F.3d at 219.

tances for covered work performed by unidentified employees. Under ERISA, "every employer shall . . . maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees." 29 U.S.C. § 1059(a)(1).[6] The statute further provides that "[t]he employer shall furnish to the plan administrator the information necessary for the administrator to make the [required] reports." *Id.*

The evidence presented in the court below indicates quite clearly that some covered work was done by unidentified employees. The plaintiffs contend that the lack of required records triggered a burden-shifting paradigm under which the defendant had to show which hours represented covered work and which did not. The district court rebuffed this contention, reasoning that the plaintiffs did not produce sufficient evidence to support a shifting of the burden. *Haluch I*, 792 F. Supp. 2d at 138. In charting this course, the court distinguished a line of cases proffered by the plaintiffs on the ground that, in those cases, "the relevant employees were ... indisputably performing covered work, and the employer failed to maintain any records concerning the work performed"; whereas in this case the plaintiffs adduced "no evidence ... indicating that *any* other clas-

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[6] We note that at least one of the plaintiffs is a multi-employer benefit plan. This feature would appear to call for the application of section 1059(a)(2) rather than section 1059 (a)(1). *See Bard* v. *Bos. Shipping Ass'n*, 471 F.3d 229, 230 & n.2 (1st Cir. 2006). The parties, however, have argued the record-keeping point exclusively in terms of section 1059(a)(1), and we accept their implicit agreement that section 1059(a)(1) is the relevant statutory provision. *See United States* v. *Bayard*, 642 F.3d 59, 62–63 (1st Cir. 2011)

sified employee actually performed covered work under the Agreement after Jagodowski left." *Id.* (emphasis in original). We review the district court's rulings about the required quantum of proof and the legal effect of the ERISA record-keeping provision de novo.

There can be no question but that section 1059(a)(1) requires an employer to document work covered by a collective bargaining agreement. *See Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 566 (1985); *Mich. Laborers' Health Care Fund* v. *Grimaldi Concrete, Inc.*, 30 F.3d 692, 695 (6th Cir. 1994); *Combs* v. *King*, 764 F.2d 818, 822–23 (11th Cir. 1985). Although we have not previously spoken to the question, several other courts have concluded that an employer's failure to keep adequate records as required by section 1059(a)(1) may trigger burden-shifting. *See, e.g., Mich. Laborers' Health Care Fund*, 30 F.3d at 695–96; *Brick Masons Pension Trust v. Indus. Fence & Supply, Inc.*, 839 F.2d 1333, 1337-39 (9th Cir. 1988); *Combs*, 764 F.2d at 826-27. Under any view, however, such burden-shifting is not automatic. In a case like this one, in which ERISA-protected benefit plans seek to enforce remittance requirements, burden-shifting occurs only when a fiduciary seeking remittance of unpaid benefit contributions shows both that some employees performed covered work that was not reported to the benefit plan and that the employer neglected to maintain adequate records. *See Motion Picture Indus. Pension & Health Plans* v. *N.T. Audio Visual Supply, Inc.*, 259 F.3d 1063, 1066 (9th Cir. 2001). In such a case, the presumption is that the employer is liable for all hours potentially representing covered work. *See Brick Masons Pension Trust*, 839 F.2d at 1338–39. This presump-

tion is rebuttable: to reduce its liability the employer must separate wheat from chaff and offer some evidence that will allow a court to calculate the extent of covered work previously unreported. *See Motion Picture Indus.*, 259 F.3d at 1066; *Combs*, 764 F.2d at 826–27.

The burden-shifting paradigm makes good sense. As the Supreme Court noted in an analogous context, an employer should not "be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records [as required]." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946); *see Mich. Laborers' Health Care Fund*, 30 F.3d at 697 (drawing the same analogy); *Brick Masons Pension Trust*, 839 F.2d at 1339 (similar). Put another way, an employer cannot evade responsibility for benefit remittances by the simple expedient of failing to keep the records that the law requires.

The circumstances of this case trigger the presumption. At trial, Joanne Martins, the defendant's president and the person who oversaw its day-to-day operations since 2006, testified that she had knowledge of work performed by the defendant's employees; that both the nature and volume of the work performed remained essentially the same during the period from 2006 to 2011; that she knew the extent of Jagodowski's duties; that, upon Jagodowski's departure in 2006, other employees continued to use and maintain the equipment he had used; and that no records existed showing either who used that equipment or the number of hours it was used. Inasmuch as no remittances were made to the plaintiffs with respect to the work performed by the unidentified employees after Jagodowski left, Martin's

testimony was sufficient to trigger the burden-shifting paradigm.

We do not accept the district court's suggestion that the burden-shifting cases are inapposite here. To begin, the court's conclusion that the plaintiffs had to show that employees performing covered work are "classified employee[s]," *Haluch I*, 792 F. Supp. 2d at 138, is incorrect because, as we have explained, the focal point of the inquiry contemplated by the CBA is covered work — not job classifications per se. Even more important, the district court's reasoning, if endorsed, would destroy the efficacy of the burden-shifting paradigm. The reality is that an employer has a strong incentive to underreport the number of covered employees because underreporting reduces the amount of the remittances it must make. *Cent. States*, 472 U.S. at 567; *see Brick Masons Pension Trust*, 839 F.2d at 1335-37. A view of the presumption that would leave the defendant better off if it kept fewer records rather than more would drain the presumption of any meaning.

To sum up, the presumption is that the defendant is liable "for all hours worked . . . in which [employees] were shown to have performed some covered work." *Brick Masons Pension Trust*, 839 F.2d at 1339. The employer, despite its record-keeping lapses, may offer evidence in an effort either to overcome the presumption or to limit its effect. In the absence of such evidence, however, the presumption controls.

Here, the benchmark for the operation of the presumption is the district court's determination that seventy-five percent of Jagodowski's work was covered by the CBA. *Haluch I*, 792 F. Supp. 2d at 136–37. From this determination, it can be presumed

that one or more employees performed Jagodowski's work after he left, that those employees worked each year the same total number of hours as Jagodowski, and that seventy-five percent of that work was covered by the CBA. Accordingly, the defendant is presumptively liable for the same number of hours of covered work for each successive year through October 31, 2010 (the last date encompassed by the plaintiffs' claim).

As we have said, this presumption is rebuttable. So far, the defendant has not rebutted it. Nevertheless, the validity and contours of this burden-shifting paradigm have, until now, been a matter of guesswork within this circuit. Given this lack of clarity, we think that the fairest course is to vacate the challenged portion of the district court's decision in *Haluch I* and remand so that the district court, applying the presumption and considering any countervailing evidence that the defendant adduces, may determine the amount of remittances owed on account of covered work performed by unidentified employees. *Cf. Pruell* v. *Caritas Christi*, 678 F.3d 10, 12–15 (1st Cir. 2012) (allowing plaintiffs to amend their complaint as a result of recent clarification in pleading requirements).

C. Attorneys' Fees.

The plaintiffs' remaining assignment of error posits that the district court's award of attorneys' fees was too skimpy. The district court's fee calculation rested appreciably on the plaintiffs' lack of success in recovering remittances referable to unidentified employees. *See Haluch II*, 792 F. Supp. 2d at 142–43. Because we have ruled that the plaintiffs are entitled to some level of payment for this work, *see supra* Part II(B), a principal pillar of the district court's

calculus has been removed. Consequently, the fee award will have to be recalculated after the appropriate amount of unpaid remittances is determined. *See, e.g., Cordero* v. *De Jesus-Mendez*, 922 F.2d 11, 19 (1st Cir. 1990) (directing recalculation of fee award in light of changes to award of damages).

As a practical matter, this circumstance counsels persuasively against any consideration of the adequacy of the fee award at this juncture. Courts ought not to venture advisory opinions, and there is nothing to be gained by passing upon the appropriateness of a fee award that must in all events be recalculated. We therefore deny this aspect of the plaintiffs' appeal without prejudice to their right to renew it if, upon the issuance of a reformulated fee award, they remain aggrieved.[7]

III. CONCLUSION

We need go no further. For the reasons elucidated above, we hold that the plaintiffs' notice of appeal was timely filed as to all issues in the case. We vacate the district court's judgments in both *Haluch I* and *Haluch II*, and remand for further proceedings consistent with this opinion. All parties shall bear their own costs.

In refashioning the award of overdue benefit-remittance payments, the district court should reinstate that portion of its previous award referable to work performed by Jagodowski (a portion of the award that was not challenged on appeal).

So Ordered.

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[7] The defendant has filed a cross-appeal with respect to the award of attorneys' fees (No. 11-1970). By separate order, we have dismissed that appeal without prejudice.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 11-1970

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS ET AL.,

Plaintiffs, Appellees,

v.

RAY HALUCH GRAVEL CO., ET AL.,

Defendants, Appellants.

Before Thompson, Selya and Dyk,*
Circuit Judges.

JUDGMENT

Entered: September 12, 2012

This appeal is dismissed without prejudice. *See Central Pension* v. *Haluch*, No. 11-1944, slip op. at 21 n.7 (1st Cir. Sept. __, 2012). All parties shall bear their own costs.

By the Court:

/s/ Margaret Carter, Clerk

cc: Hon. Michael A. Ponsor, Ms. Sarah Thornton, Clerk, United States District Court for the District of Massachusetts, Mr. Aguiar, Ms. Clark & Mr. Wagner.

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* Of the Federal Circuit, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 09-cv-11607-MAP

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 98 HEALTH AND WELFARE, PENSION AND ANNUITY FUNDS, ET AL.,

Plaintiffs

v.

RAY HALUCH GRAVEL CO.,

Defendant

MEMORANDUM AND ORDER REGARDING DEFENDANT'S MOTION TO ENFORCE SETTLEMENT AND THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING NON-JURY TRIAL (Dkt. No. 51)

June 17, 2011

PONSOR, District Judge.

I. INTRODUCTION

This is an action arising under the Employee Retirement Income Security Act of 1974 ("ERISA") to recover delinquent fringe benefit contributions allegedly owed to Plaintiffs under a collective bargaining agreement. This court conducted a three-day bench trial on February 22, 23, and 28 of this year. The memorandum below will first address Defendant's Motion to Enforce a Settlement (Dkt. 51), which was filed at the end of the trial, and then proceed to findings of fact and conclusions of law following the non-jury trial.

II. MOTION TO ENFORCE SETTLEMENT

Defendants have moved to enforce a purported settlement that took place during the course of the trial (Dkt. No. 51). Plaintiffs argues persuasively in response that the parties never entered into a settlement.

A. Factual Background.

The parties engaged in settlement negotiations up until, and subsequent to, the commencement of trial on February 22, 2011. On the morning of February 22, Plaintiffs made a demand of $35,000, and Defendant countered with an offer of $25,000 to be paid over three years. Plaintiffs rejected this offer and made no counteroffer.

During a break in the second day of trial, Defendant told Plaintiffs that it would pay $35,000 as long as that sum could be paid over three years. Plaintiffs informed Defendant that they would respond to the offer at some point in the future. Defendant asserts that it was expecting a response to the second offer later that day, but Plaintiffs maintain that counsel never gave this indication. In any event, the parties did not discuss the issue of settlement again until February 25.

On February 25, Defendant's counsel emailed Plaintiffs' counsel stating, "[s]ince I had not heard from you again regarding our offer, I talked to my clients again and, in the interest of saving any more prep time we will agree to pay the $35,000 all at once." (Dkt. 62, Ex. A, Cahillane email.) Plaintiffs' counsel responded ten minutes later stating, "[a]t this point, $35k is not going to get this case settled. . . . I will call you later today to let you know whether there's a settlement offer, and, if so, what it

is." (Dkt. No. 62, Ex. B, Brice email.) After speaking to his clients, Plaintiffs' counsel called Defendant's counsel later that afternoon stating that the demand was now $120,000 plus an agreement to indemnify Plaintiffs against claims by Defendant's employees. Defendant rejected this offer and filed the present motion seeking to bind Plaintiffs to their original demand of $35,000.

B. Discussion.

A settlement agreement "is a private contract . . . and its construction is governed by general contract law." *Warner Ins. Co. v. Comm. of Ins.*, 548 N.E.2d 188, 192 n.7 (Mass. 1990) (internal citation omitted). "Under fundamental principles of contract law, a counteroffer operates as a rejection of the original offer." *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 805 N.E.2d 957, 966 n.6 (Mass. 2004) (citing 1 Williston on Contracts § 5.3, at 629 (4th ed. 1990)).

On February 22, Defendant's counteroffer to settle for $25,000 to be paid over three years served as a rejection of Plaintiffs' offer to settle for a lump sum of $35,000. When Defendant told Plaintiffs the following day that they were now willing to pay $35,000, this communication served as a new offer, which Plaintiffs rejected three days later. Defendant's attempt to bind Plaintiffs to the original offer is, thus, contrary to "fundamental principles of contract law."[1] *Uno Restaurants, Inc.*, 805 N.E.2d at 966 n.6. Accor-

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[1] Defendant's choice to move forward with the trial after receiving Plaintiffs' offer also clearly signaled rejection. *See* 17 C.J.S. Contracts § 67 ("An offer is rejected when the offeror is justified in inferring from the words or conduct of the offeree that the offeree intends not to accept the offer . . . .").

dingly, Defendant's Motion to Enforce Settlement (Dkt. No. 51) will be denied.

III. FINDINGS OF FACT

There are currently five Plaintiff entities in this case, administered by three separate individuals: (1) the International Union of Operating Engineers Local 98 Pension Fund ("Pension Fund"), (2) the International Union of Operating Engineers Local 98 Health and Welfare Fund ("Health and Welfare Fund"), and (3) the Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund ("Apprenticeship and Training Fund"), all of which are administered by Barbara Lane; (4) the Central Pension Fund of the International Union of Operating Engineers and Participating Employers ("Central Pension Fund"), as administered by Michael R. Fanning; and (5) the International Union of Operating Engineers Local 98, AFL-CIO ("Union" or "Local 98"), as administered by Eugene P. Melville, Jr.[2] Defendant Ray Haluch, Inc. is a Massachusetts corporation with a principal place of business in Massachusetts, d/b/a Ray Haluch Gravel Co. ("the Company" or "Defendant").

The court makes the following relevant findings of fact.

1. Defendant operates a landscape supply company in Ludlow, Massachusetts. In the early 1990s,

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[2] By agreement of the parties, original Plaintiffs International Union of Operating Engineers Local 98 Annuity Fund and International Union of Operating Engineers Local 98 Cooperative Trust, and Defendant Raymond Haluch, are no longer in the case.

the Company was primarily a sand and gravel company performing site work and excavation. By 1992, the Company shifted its focus and began to sell landscaping products. Joanne Martins is currently the president and owner of Ray Haluch, Inc. She has held these positions since her father, Raymond Haluch, retired in 2006. In the off-season, she runs the Company with the help of one other full-time employee and one part-time employee. In the warmer months, the Company employs approximately seven individuals full-time.

2. The Union has geographical jurisdiction over Western Massachusetts, Vermont, and Western New Hampshire. It consists of approximately 1300 members and maintains collective bargaining agreements with approximately 150 employers.

3. The Union operates a non-exclusive hiring hall, under which employers may seek employees referred by the Local 98 hiring hall or directly hire applicants, regardless of union membership. If a non-member is hired, the employee must become a union member after thirty days of employment.

4. Since at least May 1, 1988, the Company has entered into a series of collective bargaining agreements with Local 98. The most recent agreement was effective from May 1, 2005, through April 30, 2011 ("the Agreement"). Raymond Haluch, as noted, owned the Company until his daughter took over in 2006. Haluch signed the Agreement and, at the time he signed the Agreement, Haluch thought the Agreement only required him to pay union benefits on behalf of one specific employee named Todd Downey. He

did not consult with an attorney and did not realize that the scope of the Agreement was much broader.

5. Article I of the Agreement reads as follows:

> Scope of Employment: The terms of this Agreement shall apply to all work within the jurisdiction of the Operating Engineers, Hoisting and Portable Branch, in connection with all operations usually performed in the sand and gravel industry, described in Article IV, below.

6. Article IV of the Agreement reads as follows:

> Employees are to be classified as follows:
>
> 1. Superintendent of Equipment
> 2. Master Mechanic
> 3. Maintenance Mechanic, Operators on shovels, cranes, drag-lines, bulldozers, plant operators, front end loaders, power leaders of all types and similar equipment.

7. Article VI of the Agreement states that employers must pay the rates set forth in the Agreement "for each payroll hour . . . for each employee covered by this Agreement."

8. Todd Downey worked part-time for the Company as a mechanic for several months between 2004 and 2005. During that time, the Company paid Downey more than $24 per hour even though the Agreement only required the Company to pay him $14.71 per hour.

9. The Company considered Todd Downey to be an employee covered by the Agreement and, accor-

dingly, remitted payments to the Local 98 Funds on his behalf.

10. Eugene "Mitty" Melville, the business manager of Local 98, understood "hoisting and portable branch" under Article I to mean "heavy equipment" or "all earth-moving equipment." He understood the sand and gravel industry to include "the processing of aggregate" and the use of "pits and quarries." He also believed that Ray Haluch, Inc. was engaged in such operations. Melville personally observed two individuals operating loaders on the premises, and he believed the use of loaders constituted Union work covered by the Agreement. Melville was aware that an individual named Martin Jagodowski was working for Ray Haluch, Inc., but Melville did not make an effort to collect Union dues from him.

11. Jagodowski worked for Ray Haluch, Inc., from September 2005 to September 2006. Each month during that period Jagodowski worked on average 178 hours for the Company. The Company's customers at that time were a combination of homeowners and commercial contractors. Jagodowski performed a number of jobs for the Company, including helping out in the sales area, loading commercial dump trucks, and helping retail customers load their vehicles. In the course of his employment, Jagodowski at times operated a front-end loader, bucket loader, portable plant, forklift, and Bobcat. Jagodowski spent seventy percent of his time using the above equipment, and he spent less than five percent of his time repairing the equipment. In the "off-season," which extended from November through Febru-

ary or March, Jagodowski also spent time organizing the shop and painting equipment.

12. The Company did not consider Jagodowski to be an employee covered under the Agreement and, accordingly, did not remit payments to the Local 98 Funds on his behalf.

13. After Jagodowski left the Company in September 2006, the equipment he used, *e.g.*, the front-end loader and bucket loader, remained at the Company. Other employees used that equipment after Jagodowski left and still continue to do so from time to time. The Company currently does not keep a record of the individuals who use the equipment and how long they use it.

14. In September 2004, the Trustees of the Local 98 Funds adopted a policy of conducting payroll audits of all contributing employers. In 2007, William Shannon, assistant director of audit operations at the accounting firm Schultheis & Panettieri, LLP, was asked to conduct an audit of Ray Haluch, Inc. Shannon's first audit covered the period between January 1, 2005, and March 31, 2009. Shannon conducted a second audit covering the period between April 1, 2009, and December 31, 2009. Shannon prepared a third and final audit report at the request of Plaintiffs' counsel estimating the covered hours worked by unknown employees between October 2006 and October 2010, based on the known work hours of Martin Jagodowski from September 2005 through September 2006.

15. The Company notified the Local 98 Funds by letter dated December 28, 2010, that it sought to

terminate the 2005 Agreement, effective April 1, 2011.

IV. CONCLUSIONS OF LAW

Plaintiffs now seek to recover delinquent fringe benefit contributions (plus interest, liquidated damages, and attorneys' fees) for hours worked by Martin Jagodowski and for hours worked by unidentified employees doing the same sort of work as Jagodowski after Jagodowski left the Company in September 2006. Plaintiffs originally sought to recover delinquent contributions for hours worked by two other employees, Todd Downey and William Condon, but did not pursue these claims at trial.

A. Whether Martin Jagodowski was a Covered Employee under the Agreement.

Defendant does not dispute the fact that it failed to remit payments to Plaintiffs on behalf of Martin Jagodowski. Instead, Defendant argues that the Agreement did not cover Jagodowski. This court disagrees. While Defendant correctly observes that relevant provisions of the contract are ambiguous, the court finds Defendant's suggested construction and application of these provisions unpersuasive.

"For purposes of interpreting the meaning and scope of [collective bargaining agreements], this court is guided by settled principles of contract interpretation." *R. I. Carpenters Annuity Fund v. Trevi Icos Corp.*, 474 F. Supp. 2d 326, 335 (D. R.I. 2007) (citing *Burnham v. Guardian Life Ins. Co. of Am.*, 873 F.2d 486, 489 (1st Cir. 1989)). Contract language is ambiguous if its terms "are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of the words employed and obligations undertaken." *Smart*

v. Gillette Co. Long-term Disability Plan, 70 F.3d 173, 178 (1st Cir. 1995) (quoting *Fashion House, Inc. v. K-Mart Corp.*, 892 F.2d 1076, 1083 (1st Cir. 1989)).

While the issue of whether a contract is ambiguous is a question of law, the issue of how to construe an ambiguous provision is one of fact. *See Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 219 (1st Cir. 2006). Where ambiguity exists, "the ultimate resolution of it typically will turn on the parties' intent." *Smart v. Gillette Co. Long-term Disability Plan*, 70 F.3d 173, 178 (1st Cir. 1995). This inquiry requires courts to "consider extrinsic evidence insofar as it sheds light on what the parties intended." *Lohnes v. Level 3 Communications, Inc.*, 272 F.3d 49, 54 (1st Cir. 2001). Specifically, courts may look to "the scope of other related collective bargaining agreements, as well as the practice, usage and customs pertaining to such agreements." *Transp. Comm'n Employees Union v. Union Pac. R.R.*, 385 U.S. 157, 161 (1966).

This court denied Defendant's motion for summary judgment due to an apparent ambiguity in the Agreement. Article I states that the Agreement applies "to all work within the jurisdiction of the Operating Engineers, Hoisting and Portable Branch, in connection with all operations usually performed in the sand and gravel industry, described in Article IV, below." (Trial Joint Ex. 1.) Despite this language, Article IV offers no "description" of work performed in the industry, but merely lists three classifications of employees covered under the Agreement: (1) superintendent of equipment, (2) master mechanic, and (3) maintenance mechanic/operator. (*Id.*) This last category includes "operators on shovels, cranes, drag-lines, bulldozers, plant operators, front end

loaders, power leaders of all types and similar equipment." (*Id.*)

These provisions are notably unhelpful in both breadth and detail. Of most relevance here is the lack of any explanation concerning *how* employees receive the above classifications and *who* determines whether those classifications are accurate.[3] Plaintiffs contend that Martin Jagodowski was an employee covered under the Agreement, but Defendant disagrees, asserting, in essence, that Jagodowski cannot be classified properly under any of the three categories in Article IV and that the parties never intended to cover him under the Agreement.

To resolve this dispute, the court heard testimony from multiple witnesses over the course of a three-day bench trial. Most significantly, Jagodowski himself testified that he spent seventy percent of his time using front-end loaders and other heavy machinery. He spent another roughly five percent of his time repairing such equipment. This testimony was uncontradicted.

In their proposed findings of fact, Defendant asserts that Jagodowski did not actually mean that seventy percent of *all* work he performed involved the use of heavy equipment, because during the off-season, which lasted for most of the winter, he was engaged primarily in painting equipment and organizing the shop. This argument, however, ignores the

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[3] In addition, as discussed below, the Agreement does not clearly state whether the employer must remit payments for *all* work performed by classified employees or only for time spent performing covered work. This is an especially critical omission for employees such as Jagodowski, who regularly performed both covered and non-covered work.

directness and clarity of Jagodowski's testimony. When asked "what percentage of your time did you spend in your workday on average operating the equipment you have listed here?" he answered, "Again it's seasonal, but if I had to take a guess, I'd probably say 70% of the time." (Tr. 2/23/11 at 121–22.) Thus, Jagodowski clearly contemplated the seasonality of the business when he gave his estimate. To remove all doubt, Plaintiffs' counsel followed up with the question: "All totaled on average?" Mr. Jagodowski responded: "Correct." (*Id.*)

Even in light of Jagodowski's undisputed, extensive operation of heavy equipment listed in the Agreement, Defendant maintains that the parties did not intend to cover work performed by Jagodowski when they signed the Agreement. In support, Defendant relies on several pieces of evidence concerning the parties' intent. None is persuasive.

First, Defendant elicited testimony from several witnesses attempting to prove repeated violations of the Agreement, such as ignoring the wage rates set forth in the Agreement or failing to collect dues from other Company employees who were using heavy equipment. Such evidence, Defendant argues, indicates that the parties considered the contract to be "meaningless." (Dkt. No. 67, Def's Proposed Findings at 4.)

This argument is both factually and legally unfounded. The parties knowingly bound themselves to this contract, and they made no effort to repudiate it during the relevant time period. Furthermore, Defendant made remittances on behalf of at least one employee under the Agreement, and Plaintiffs collected these remittances. All of this points to the existence and continuation of a binding contract. More-

over, the failure to enforce a particular contractual provision does not negate the entire contract. *See, e.g.*, 13 Williston on Contracts § 39:35 (4th ed. 1990) ("[W]hile nonaction by both parties may constitute a waiver and mutual negation of a particular provision, the rest of the contract will remain in force where the parties, by their acts and statements, show that they consider the agreement to otherwise retain its vitality.").

Second, Defendant suggests that the parties' past practice also indicates that they did not believe that Article IV applied to anyone other than Todd Downey. Defendant has argued that "[i]t is absurd to think that the Union, believing that everyone working in Haluch's yard was covered by their agreement, saw them working there, but simply decided to do nothing for *eighteen* years." (Dkt. No. 67, Def's Proposed Findings at 22 (emphasis in original).) Even after trial, however, the court has little evidence before it of other workers who operated heavy equipment for the Company in the years prior to Jagodowski's employment. It is unclear how many employees performed this work, what percentage of their time was spent performing such work, or even what their names were. Moreover, Defendant did not present any evidence indicating that Plaintiffs had actual knowledge of the extent of the work being performed or the individuals performing such work over an eighteen-year period.

Third, Defendant points to the testimony of Ray Haluch, who owned the Company at the time the parties signed the Agreement and who, in fact, signed the Agreement on behalf of the Company. Haluch stated that when he signed the contract, he was under the (mistaken) impression that it covered Todd

Downey and no one else. Haluch testified credibly, but his intention or understanding cannot trump clear language in the Agreement stating that it covers not one employee but several *types* of employee. (*See* Joint Trial Ex. 1, Art. I.) The ambiguity is not whether the contract covers more than just Todd Downey; it absolutely does. Again, the ambiguity lies in *how* employees are to be classified. Can an employee who operates a loader ten percent of the time be classified as a "maintenance mechanic/operator"? (*Id.* Art. IV.) Fifty percent of the time? Sixty? In addition, who makes this determination? The contract leaves these questions unanswered.

Whatever uncertainties exist in the terms of the Agreement, it certainly covered Martin Jagodowski. As noted, Jagodowski testified, credibly and without contradiction, that he spent approximately seventy-five percent of his time operating and repairing heavy equipment such as front-end loaders and bucket loaders. These activities undeniably fell under the third classification in Article IV of the Agreement, which included "operators on shovels, cranes, drag-lines, bulldozers, plant operators, front end loaders, power leaders of all types and similar equipment." (Joint Trial Ex. 1, Art. IV.) Accordingly, Jagodowski was a covered employee, and Defendant had an obligation to remit payments to Plaintiffs on his behalf.

B. Amount of Delinquent Contributions.

In addition to the classification of covered employees, a second, related ambiguity involves the extent of the employer's obligation to make contributions on behalf of covered employees. Article VI of the Agreement states that employers must pay the rates set forth in the Agreement "for each payroll

hour . . . for each employee covered by this Agreement." (Trial Joint Ex. 1.) The Agreement does not specify whether employers must remit payments for each payroll hour spent performing *any* work or for each payroll hour spent performing *covered* work.

As explained above, the entire Agreement appears to be drafted with the mistaken (and somewhat surprising) assumption that employees would perform *only* covered work *or* non-covered work, and it does not contemplate the possibility of employees splitting their time. Under these circumstances, the most plausible reading of the Agreement is that employers must remit payments only for time spent by covered employees performing covered work.

This conclusion finds support in the uncontradicted testimony of William Shannon, assistant director of audit operations at the accounting firm Schultheis & Panettieri, LLP. In response to an inquiry from the court, Shannon testified that he makes adjustments to audit reports if he knows that only a certain percentage of the employee's reported time is spent performing covered work.

In light of the foregoing, the court instructed Plaintiffs to calculate unpaid contributions based on seventy-five percent of Jagodowski's hours worked between September 2005 and September 2006. Accordingly, Plaintiffs submitted a revised spreadsheet, revealing $10,267.11 in delinquent contributions and deductions, $8,545.31 in interest through March 2, 2011, and $8,084.99 in liquidated damages, totaling

$26,897.41.[4] (*See* Dkt. No. 54, Ex. C.) Defendant has not challenged these calculations.

C. Unpaid Contributions on behalf of Unknown Employees.

Plaintiffs also seek an additional $156,988.54 based on Plaintiffs' estimates of covered work not recorded by Defendant.[5] Plaintiffs argue that, where an employer fails to maintain adequate records for examination by an employee benefit plan, the plan is entitled to estimate the delinquency and the employer has the burden of disproving this estimate. Here, Jagodowski terminated his employment with the Company in September 2006, and Defendant did not remit contributions for covered work performed by Jagodowski's hypothetical substitutes after he left. Accordingly, Plaintiffs estimated that these putative substitutes performed 242 hours of covered work each month from October 2006 through October 2010, totaling $156,988.54 in additional delinquent contributions.[6] Plaintiffs have failed to offer suffi-

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[4] Plaintiffs' original estimate, which did not account for the twenty-five percent reduction, included $13,689.39 in delinquent contributions and deductions, $11,393.72 in interest through March 2, 2011, and $10,779.95 in liquidated damages, totaling $35,863.06. (*See* Dkt. No. 54, Ex. A.)

[5] This figure consists of $82,921.30 in estimated delinquent fringe benefit contributions, $4,361.00 in deductions, $34,880.69 in interest, and $34,825.77 in liquidated damages. (*See* Dkt. No. 54, ¶ 13.)

[6] Although this point is mooted by the court's ruling below, it is worth noting that Plaintiffs' calculations (based on 242 hours worked per month) grossly overstate Jagodowski's actual hours worked, which, by all accounts, averaged 178 hours per month from September 2005 through September 2006. When the court pointed out this apparent discrepancy, Plaintiffs explained that

cient, persuasive support for this substantial enhancement of damages.

The relevant ERISA provision reads as follows:

> [E]very employer shall . . . maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan . . . .

29 U.S.C. § 1059 (a)(1). Plaintiffs rely on several cases in which federal courts of appeals have held that a failure to maintain records in accordance with § 1059 (a)(1) shifts the burden onto the employer to provide evidence of hours worked. *See, e.g., Mich. Laborers' Health Care Fund v. Grimaldi Concrete, Inc.*, 30 F.3d 692, 696 (6th Cir. 1994); *Brick Masons Pension Trust v. Industrial Fence & Supply*, 839 F.2d 1333, 1338 (9th Cir. 1988); *Combs v. King*, 764 F.2d 818, 826 (11th Cir. 1985).

These cases are inapposite. In all three, it was clear that the relevant employees were, in fact, indisputably performing covered work, and the employer failed to maintain any records concerning the work performed. *See, e.g., Mich. Laborers' Health Care Fund*, 30 F.3d at 696 ("[The employer] provided no records at all with respect to 80% of the work performed under the collective bargaining agree-

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they arrived at the figure after dividing Jagodowski's total monthly income by the (significantly lower) wage rate established in the Agreement, resulting in an inflated number of hours worked per month.

ment . . . ."); *Brick Masons Pension Trust*, 839 F.2d at 1338 (9th Cir. 1988) ("It is undisputed that these 35 [employees] performed some covered work for Industrial . . . ."); *Combs*, 764 F.2d at 826 (holding that burden shifted to employer who had failed to maintain records for hours worked by defendant's "classified employees").

In contrast, this court has no evidence before it indicating that *any* other classified employee actually performed covered work under the Agreement after Jagodowski left. As noted, § 1059 (a)(1) requires employers to make a report on behalf of "each employee *who is a participant under the plan*." 29 U.S.C. § 1059 (a)(1) (emphasis added). *See also Mich. Laborers' Health Care Fund*, 30 F.3d at 695 ("Section 1059 imposes a duty of responsibility and record keeping on employers with respect to all employees who are participants in an employee benefit plan.") (citation and quotation marks omitted).

The only relevant evidence put forth at trial was the testimony of Joanne Martins, the Company's current president and owner, who stated only that the heavy equipment used by Jagodowski continued to remain in operation, to some extent, after he left. She did not testify (and Plaintiffs did not produce any other evidence) concerning who these supposed employees were, what percentage of their time was spent operating the equipment, or exactly which equipment they operated. Simply put, Plaintiffs have offered no evidence, beyond speculation, that Defendant employed other individuals who could be classified as participants under the Agreement after Jagodowski left and who would trigger the record-keeping requirements of § 1059 (a)(1). Since they failed to prove that Defendant violated § 1059 (a)(1), Plain-

tiffs are not entitled to contributions for unidentified work performed by unidentified employees between October 2006 and October 2010.

V. CONCLUSION

For the foregoing reasons, the court hereby finds for Plaintiffs in the total amount of $26,897.41. The clerk will enter judgment for Plaintiffs in this amount. The court will rule on Plaintiffs' pending motion for attorneys' fees (Dkt. 69) in a separate memorandum to follow.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-11607-MAP

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 98 HEALTH AND WELFARE, PENSION AND ANNUITY FUNDS, ET AL

Plaintiff(s)

v.

RAY HALUCH GRAVEL CO.,

Defendant(s)

JUDGMENT IN A CIVIL CASE

PONSOR, D..J:

☐ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT entered for the Plaintiff pursuant to the Memorandum and Order of the Court entered this date denying the Defendant's motion to enforce settlement and finding for the Plaintiffs'

In the total amount of $26,897.41.

SARAH A. THORNTON,
CLERK OF COURT

Dated: June 17, 2011

By /s/ Mary Finn
Deputy Clerk

NOTE: The post judgment interest rate effective this date is ____%.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 09-cv-11607-MAP

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 98 HEALTH AND WELFARE, PENSION AND ANNUITY FUNDS, ET AL.,

Plaintiffs

v.

RAY HALUCH GRAVEL CO.,

Defendant

MEMORANDUM AND ORDER REGARDING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES (Dkt. No. 69)

July 25, 2011

PONSOR, D.J.

I. INTRODUCTION

Following a three-day bench trial in this ERISA action, the court entered judgment in favor of Plaintiffs in the amount of $26,897.41. In addition to this damage award, Plaintiffs seek attorneys' fees and costs of $143,600.44. (Dkt. No. 69.) For the reasons set forth below, the court will allow fees, but at a level substantially below the requested amount.

II. DISCUSSION

Section 1132 states that in any successful action to recover delinquent contributions under ERISA, "the court shall award the plan . . . reasonable attor-

ney's fees and costs of the action . . . ." 29 U.S.C. § 1132(g)(2)(D). Because this statute does not specify the appropriate fee-shifting methodology, the court will apply the lodestar analysis. *See Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 526 (1st Cir. 1991); *McGahey v. Harvard Univ. Flexible Benefits Plan*, 685 F. Supp. 2d 181, 184 (D. Mass. 2010). The lodestar is determined "by multiplying the number of hours productively spent by a reasonable hourly rate to calculate a base figure." *De Jesus Nazario v. Morris Rodriguez*, 554 F.3d 196, 207 (1st Cir. 2009). Prior to making this calculation, the trial court "may adjust the hours claimed to remove time that was unreasonably, unnecessarily or inefficiently devoted to the case" and "may disallow time spent litigating failed claims" as long as those hours were not inextricably tied to the litigation of successful claims. *Id.*

Here, the hourly rates charged by Plaintiffs' counsel, ranging from $194 per hour to $260 per hour, are not problematic. *See McGahey*, 685 F. Supp. 2d at 184 (holding that core billing rate of $350 per hour was reasonable and citing cases approving rates ranging from $275 to $350 per hour); *accord* Dkt. No. 69, Ex. C, Janus Aff. ¶ 5 (noting that these rates are consistent with those commonly charged for such matters in the state of Connecticut, where Plaintiffs' counsel's law firm is based). However, the hourly rates charged for paralegal work, $134 to $141 per hour, are excessive, and the court will reduce these to the more reasonable rate of $100 per hour. *See, e.g., In re Neurontin Prods. Liability Litig.*, No. 04-cv-10981-PBS, 2011 WL 1326407, at *7 (D. Mass. Apr. 5, 2011) (capping paralegal rate at $100 per hour); *Ferraro v. Kelley*, No. 08-cv-11065-DPW, 2011 WL 576074, at *6 (D. Mass. Feb. 8, 2011) (approving proposed rate of $90 per hour for paralegal

work and declining defendants' invitation to reduce rate to $60 per hour). Given the small number of hours billed for paralegal work, this finding has a negligible impact on the total award, merely reducing paralegal fees from $938.80 to $675.00.

Far more significant to the fee calculation is the prodigious number of attorney hours billed. In this rather uncomplicated case, Plaintiffs billed 494.7 hours of work, involving *six* different attorneys at a cost of just over $125,000. A substantial reduction of this claim is necessary to set the threshold lodestar figure at a reasonable level, for several reasons.

First, as noted, this was a straightforward case. The core issue was whether a single individual, Martin Jagodowski, should be considered a "classified" employee under the Agreement. Jagodowski testified (without contradiction) as to his job responsibilities while employed by Ray Haluch, Inc. The underlying legal issues were not especially complex. The facts were not extensive, and the trial took place before a judge, not a jury, and lasted only three half-days, from 9:00 a.m. to 1:00 p.m. This case required neither the number of hours nor the number of attorneys devoted to it. *See Lipsett v. Blanco*, 975 F.2d 934, 938 (1st Cir. 1992) ("[A] court should not hesitate to discount hours if it sees signs that a prevailing party has overstaffed a case.").

Second, a comparison between Defendants' counsel's hours (billed by one attorney) and Plaintiffs' counsel's hours confirms the court's intuition. While Plaintiffs' counsel seeks compensation for roughly 500 hours, Defendants' counsel reports working 270.6 hours on the same matter. (Dkt. No. 70, Ex. A, Cahillane Aff.) As Defendants correctly note, although the parties' hours "need not be the same . . .

the disparity in this case is huge." (Dkt. No. 70, Defs.' Opp'n ¶ 4.)

Third, Plaintiffs' counsel spent many hours pursuing claims that were eventually dropped. Plaintiffs originally sought to collect unpaid contributions on behalf of two other individuals, Todd Downey and William Condon. Yet, on the eve of trial, Plaintiffs abandoned these claims. Based on the submitted time sheets, it is impossible for the court to excise the time spent pursuing claims on behalf of these individuals, which appears considerable. For instance, on June 14 and 15, 2010, Plaintiffs' counsel reviewed documents, prepared for depositions, and then conducted depositions of both Jagodowski (relevant) and Downey (irrelevant or, at best, marginally relevant). Plaintiffs' counsel did not separate out these tasks, which totaled twenty hours and more than $5,200.

Fourth, the court has uncovered several charges that were excessive or unnecessary. For example, as Defendants note, Plaintiffs expended more than 100 hours and almost $30,000 in preparing and arguing an unsuccessful motion for summary judgment. The outcome of the case turned on a fact-based dispute about the interpretation of the Agreement, which was unsuited for summary judgment. Yet Plaintiffs expended approximately thirty hours on their reply brief alone.

Other elements of the fee claim stand out as excessive. For example, in preparing for and attending a final pretrial conference on February 4, 2011, Plaintiffs' counsel billed 9.6 hours or $2,496. On February 9, 2011, Plaintiffs' counsel spent one hour, or approximately $200, researching the law regarding factors considered in awarding discretionary attorneys' fees under 29 U.S.C. § 1132(g)(1), which, Plain-

tiffs now admit, was not relevant to this case. (*See* Dkt. No. 69, Ex. D, Wagner Aff. ¶ 4.)

Finally, the fee request contains numerous instances in which counsel "communicated with" various clients, including Auditor Shannon, President Melville, the Board of Trustees, and Administrator Lane, among others, in order to update them on the status of the litigation. While communication with clients is appropriate to some degree, the level here exceeded the bounds of reasonableness.

In sum, counsel's effort to eliminate excessive, duplicative, or unnecessary charges from this fee request fell short. *See Lewis v. Kendrick*, 944 F.2d 949, 956 (1st Cir. 1991) ("Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."). In these circumstances an across-the-board reduction is appropriate. *See Adams v. Bowater*, No. 00-12-B-C, 2004 WL 1572697, at *7 (D. Me. May 19, 2004) (observing that "a line-by-line consideration of the multitude of time entries presented is not practicable" and discounting sixty percent of hours challenged); *OCG Microelectronic Materials, Inc. v. White Consol. Indust., Inc.*, 40 F. Supp. 2d 83, 86 (D. R.I. 1999) ("[T]he First Circuit generally approves of such across-the-board discounts . . . .").

Based on the foregoing, the court will reduce Plaintiffs' request by one-third, down to a lodestar of $84,656.50 (including $675 in paralegal fees) or 329.80 attorney hours. A one-third across-the-board reduction accounts for the case's relative lack of complexity, time spent pursuing claims that were dropped before trial, overstaffing, and other excessive or unnecessary charges, and it brings the total

at least into something like the same universe of hours charged by Defendants' counsel.

The court's analysis, however, does not end here. A reasonable fee award also "takes into account the quality of the results that the plaintiff obtained." *De Jesus Nazario v. Morris Rodriguez*, 554 F.3d 196, 207 (1st Cir. 2009). Accordingly, the court "may adjust the lodestar itself, upwards or downwards, based on any of several different factors, including the results obtained and the time and labor actually required for the efficacious handling of the matter." *Torres-Rivera v. O'Neill-Cancel*, 524 F.3d 331, 336 (1st Cir. 2008). As the Supreme Court stated, a further reduction is appropriate if

> the relief, however significant, is limited in comparison to the scope of the litigation as a whole. ... [W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Henskley v. Eckerhart, 461 U.S. 424, 436 (1983).

Here, the complaint demanded $35,863.06 on behalf of Martin Jagodowski and another $156,988.54 on behalf of unidentified employees, totaling close to $200,000. For the reasons set forth in the earlier memorandum, the court awarded Plaintiffs $10,267.11 in delinquent contributions, plus interest and liquidated damages, totaling $26,897.41 — a fraction of the complaint's demand. In this light, the lodestar figure (plus costs) is revealed as grossly disproportionate to the actual damages award. The threshold lodestar figure of $84,656.50, plus $16,688.15 in costs, would make the award four

times the total damages obtained and ten times the delinquent contributions.[1]

While certain cases may justify a fee award substantially larger than the actual damages suffered, this is not one of them. Consequently, the court will further reduce the award to better reflect the results achieved. In doing this, the court need not follow a "rigid prescription" and "may either eliminate specific hours or reduce the overall fee to account for the prevailing party's limited success." *United States v. Flash II*, 546 F.3d 26, 38 (1st Cir. 2008). In this case, the latter approach is more appropriate, and the court finds a reasonable attorneys' fee award to be roughly two-thirds of the judgment, or $18,000, plus costs of $16,688.15, resulting in a total award of $34,688.15.

Two final points are in order. First, counsel on both sides of this case did an adequate job representing their clients' interests; nothing in this memorandum is intended to suggest otherwise. Second, it is noteworthy that the total award, including costs, amounts to more than three times the delinquent contributions that were recovered.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Attorneys' Fees (Dkt. No. 69) is hereby ALLOWED IN PART. The court hereby awards Plaintiffs attorneys' fees and costs in the total amount of $34,688.15. This case may now be closed.

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[1] Plaintiffs' requested costs, which include $6,537.00 in audit fees and $10,151.14 in travel costs, as well as other miscellaneous expenses, are reasonable.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge

APPENDIX F

THIS AGREEMENT made and entered into by and between RAY HALUCH GRAVEL COMPANY, INC. of 1014 Center Street, Ludlow, Massachusetts, party of the first part, hereinafter called the Employer and the INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 98, 98A, 98B and 98C of East Longmeadow, Massachusetts, party of the second part, hereinafter called the Union.

ARTICLE I

Scope of Employment: The terms of this Agreement shall apply to all work within the jurisdiction of the Operating Engineers, Hoisting and Portable Branch, in connection with all operations usually performed in the sand and gravel industry, described in Article IV, below.

ARTICLE II

Union Security: The Employer recognizes the Union as the bargaining agent for the employees covered by the Agreement for the purpose of collective bargaining. It is further agreed, that it shall be a condition of employment that all such employees be and remain members in good standing of the Union: except that new employees must become and remain members in good standing after thirty (30) days of employment.

It is further agreed, that if the Employer needs additional employees, he will give the Union equal opportunity with other sources to furnish applicants for employment.

ARTICLE III

Hours: The regular work day shall be eight (8) hours, Monday thru Friday. The regular starting time shall be between 7:00 AM and 8:00 AM with one half (1/2) hour lunch period. Any work performed before starting time and after eight (8) hours on a regular work day shall be at time and one half.

The regular starting time must be established on the first day of the week and will continue for a week or more and can only be changed at the end of a week.

The regular work week shall be forty (40) hours, eight (8) hours each day, Monday through Friday. Time and one half shall be paid for all overtime, except that work performed on Sunday or a Holiday shall be at double time. Saturday shall be time from Friday midnight until Saturday midnight. Sunday shall be from Saturday midnight until Sunday midnight.

Reporting time on Saturday or Sunday shall be two (2) hours at premium pay; and for starting work, no less than four (4) hours at premium pay; and for work beyond the fourth (4th) hour, no less than eight (8) hours at premium pay.

ARTICLE IV

Employees are to be classified as follows:

1. Superintendent of Equipment

2. Master Mechanic

3. Maintenance Mechanic, Operators on shovels, cranes, drag-lines, bulldozers, plant operators, front end loaders, power leaders of all types and similar equipment.

ARTICLE V

The rate of wages shall be as follows:

Effective Date	05-01-05	05-01-06	05-01-07
Classification:			
1	$14.71	$14.71	$14.71
2	14.61	14.61	14.61
3	14.51	14.51	14.51
Health & Welfare	3.75	4.25	4.75
Pension Fund	1.45	1.65	1.85
Central Pension Fund	.25	.25	.25
Training Fund	.15	.20	.25

ARTICLE VI

1. The Employer agrees to and shall pay and contribute an amount equal to that shown under Article V in this Agreement to the following Funds:

a) International Union of Operating Engineers, Local 98 Health & Welfare Fund, hereinafter referred to as the "Welfare Fund".

b) International Union of Operating Engineers, Local 98 Pension Fund, hereinafter referred to as the "Pension Fund".

c) Central Pension Fund of the International Union of Operating Engineers and Participating Employers, hereinafter referred to as the "Central Pension Fund".

d) International Union of Operating Engineers Annuity Fund, hereinafter referred to as the "Annuity Fund".

e) Local 98, Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, hereinafter referred to as the "Training Fund".

2. The respective rates per hour as shown under Article V for the Welfare Fund and the Pension Fund shall be paid for each payroll hour (an overtime hour for this purpose shall be considered a single hour) and proportionately for each part of such an hour for each employee covered by this Agreement, up to a maximum of two thousand eighty (2,080) hours in any one calendar year. Contributions to the Central Pension Fund and the Annuity Fund as shown under Article V, shall be for all payroll hours (an overtime hour for this purpose shall be considered a single hour) and proportionately for each part of such an hour for each employee covered by this Agreement. On or before the tenth (10th) day of each month the said payments shall be due and payable for all such payroll periods ending the next preceding month.

3. Failure by the Employer to make contributions in accordance with Sections 1 and 2 may be treated by the union as a breach of this working Agreement by the Employer, which may result in immediate work stoppage and the use of picket lines against the Employer. Any costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer.

ARTICLE VII

Upon notification by the Union that a uniform administrative dues deduction has been authorized by the employees of the Employer, the Employer shall deduct said uniform administrative dues. The Union shall he responsible for obtaining all individu-

al signed authorizations. The Union will hold harmless the Employer for any liabilities under said deductions.

ARTICLE VIII

Holidays: Employees shall be entitled to the following holidays:

New Year's Day	Washington's Birthday	Memorial Day
Fourth of July	Labor Day	Columbus Day
Veteran's Day	Thanksgiving Day	Christmas Day

or the days on which these holidays are observed. On these days the employees will receive eight (8) hours pay as holiday pay, regardless of what day the holiday falls on. Double time will be paid for all work performed on such days. Employees on the payroll as of December 1st shall be paid for Christmas Holiday pay.

ARTICLE IX

Vacations: All employees employed by the Employer from one (1) to three (3) years, are (1) to be given one (1) week vacation with pay. Employees with four (4) years to nine (9) years are to be given two (2) weeks vacation with pay. Employees with ten (10) years to nineteen (19) years are to be given three (3) weeks vacation with pay. Employees with twenty (20) years and over are to be given four (4) weeks vacation with pay. An Employee must work a total of twelve hundred (1,200) hours to be given credit for a year for a year's credit in any one year.

Employee's entitled to two, three or four weeks vacation may select one week at the employee's option by making mutual arrangements with the Em-

ployer and the particular employee as to the time of vacation.

ARTICLE X

The Business Agent will be allowed to visit the yards of the Employer at all reasonable times to see that the terms of this Agreement are being complied with.

ARTICLE XI

No employee of the Employer shall take the place of an employee who has been discharged through no fault of his own, pending an investigation by the Union or it authorized Agent. Provided such employee who has been discharged makes a complaint to the Union or Agent of the Union within twenty four (24) hours of his discharge, then he is to be returned to his job and the Employer will have to pay for his lost time, providing it does not exceed one weeks pay. Failure to adjust any case under this Article, it will be referred to the following Article for grievance procedure.

ARTICLE XII

There shall be a Committee of two (2), one from the Employer and one from the union to serve as a Grievance Committee in any case of trouble arising on the job. The same to be referred to them for settlement. If they fail to agree, they are to appoint a third party to hear both sides, whose decision shall be final and binding on both parties.

ARTICLE XIII

The provisions of this Agreement shall be binding upon the company and its successors, assigns or

transferees by sale, merger consolidations or otherwise.

The terms of this Agreement shall become effective May 1, 2005 and shall continue in effect until April 30, 2008 .

This Agreement shall continue to be effective from year to year unless either party on or before January 1, 2008, or prior to January 1 in any year thereafter gives notice in writing to the other party of its intention to terminate, alter or amend this Agreement.

It is further agreed that the parties shall meet before January 1, 2008 to negotiate wage rates and/or fringe benefit rates. It is further agreed that any other terms and conditions of employment shall not be subject to direct or indirect negotiation for the full duration of the Agreement, except by mutual agreement of the parties.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their duly authorized representatives this 18 day of ~~July,~~ June , 2005.

[illegible]

FOR THE EMPLOYER	FOR THE UNION
/s/ [illegible]	/s/ [illegible] Business Manager/President
	/s/ [illegible] Recording-Corresponding Secretary

OPPOSITION BRIEF

No. 12-992

In The Supreme Court of the United States

RAY HALUCH GRAVEL CO., ET AL.,

Petitioners,

v.

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A federal district court ruled on a breach-of-contract claim for damages. Just over a month later, it ruled on a discrete contractual claim for damages pleaded in the same complaint, which (a) sought to recoup pre-litigation (as well as litigation) collection expenses and fees and (b) was not contingent on being a "prevailing party" in litigation.

The question presented is whether the first order is a "final decision" that must be appealed separately under 28 U.S.C. § 1291, or whether instead a notice of appeal filed within 30 days of the second order brings the entire case before the court of appeals.

PARTIES TO THE PROCEEDING

Petitioners are Ray Haluch Gravel Co.; Ray Haluch Inc., d/b/a Ray Gravel Co.; Ray Haluch, Inc., d/b/a Ray Haluch Gravel Co.; Ray Haluch Gravel Company, Inc., d/b/a Ray Haluch Gravel Co.; Raymond Haluch, individually and as an Officer of Ray Haluch, Inc. and Ray Haluch Gravel Company, Inc.; and Raymond Haluch, individually and d/b/a Ray Haluch Gravel Co. All petitioners were defendants-appellees/cross-appellants below.

Respondents are Central Pension Fund of the International Union of Operating Engineers and Participating Employers, by Michael R. Fanning, as Chief Executive Officer; International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, by Barbara Lane, as Administrative Manager; International Union of Operating Engineers Local 98 and Employers Cooperative Trust, by William Sullivan and Eugene P. Melville, Jr., as Trustees; International Union of Operating Engineers Local 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager; and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, by Barbara Lane, as Administrative Manager. All respondents were plaintiffs-appellants/cross-appellees below.

CORPORATE DISCLOSURE STATEMENT

No respondent is a corporation.

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STATEMENT

Respondents are a labor union that represents workers employed by petitioners in their landscaping-supplies business, and multi-employer employee-benefit funds that provide pension and other benefits to their participant employees. Petitioners failed to make required contributions and related payments to the funds and to keep proper records documenting work by covered employees, so respondents had to engage auditors and lawyers in an effort to collect the delinquent contributions. The collective bargaining agreement between petitioners and the union required petitioners to reimburse respondents for these costs of collection, whether or not litigation was commenced.

When petitioners repeatedly refused respondents' demands for the required payments, respondents sued in federal court to recover them. In their complaint, respondents sought damages for the delinquent payments and for the expenses of collecting them. The district court ruled on the issues in two separate orders, finding for respondents on both issues with respect to one employee, but ruling against respondents with respect to employees who could not be identified because of petitioners' failure to keep the required records. Respondents appealed both orders insofar as they rejected the claims related to the unidentified employees.

The narrow question presented by the petition is whether the court of appeals correctly held that

respondents' appeal was timely. Petitioners argue that the court below should have dismissed a meritorious appeal as filed too late because the district court's first order was supposedly final and should have been appealed separately, even though that order did *not* resolve all of the contract claims for pre-litigation damages. The decision below does not conflict with the decisions of this Court or of any other court of appeals. Further review of this correct ruling is unwarranted.

A. Factual Background

1. Beginning in 1988, petitioner Ray Haluch Gravel Company, Inc. ("the Company") entered into a series of collective bargaining agreements with the International Union of Operating Engineers Local 98, AFL-CIO ("the Union").[1] The Union operates a non-exclusive hiring hall through which employers may hire union or non-union workers. Pet. App. 24a.

The most recent collective bargaining agreement (the "Agreement") covered the period from May 1, 2005 through April 30, 2011. Under the Agreement, the Company was required to remit contributions on behalf of employees who performed certain types of work to Union-affiliated benefit funds (the "Funds").

---

[1] The Company has variously been called "Ray Haluch, Inc.," "Ray Haluch Gravel Company, Inc." and other similar names. We refer to those entities, as well as their owner and officer, Ray Haluch, as "petitioners" or "the Company."

Pet. App. 3a, 24a-25a.[2] Covered employees included various mechanics and employees who operated "shovels, cranes, drag-lines, bulldozers, plant operators, front end loaders, power leaders of all types and similar equipment." *Id.* at 50a. The Agreement further provided that "[a]ny costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer." *Id.* at 52a.

2. The Company failed to make required contributions to the Funds for some of its employees, including Martin Jagodowski, who was employed from September 2005 until September 2006. As the district court found, he spent over seventy percent of his time performing work covered by the Agreement (operating a front-end loader, bucket loader, portable plant, forklift and Bobcat). Nevertheless, the Company made no contributions to the Funds on his behalf. Pet. App. 26a-27a.[3]

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[2] The Funds include the Central Pension Fund of the International Union of Operating Engineers and Participating Employers; the International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds; the Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund; and the International Union of Operating Engineers Local 98 and Employers Cooperative Trust. Pet. App. 3a n.2.

[3] Ray Haluch, who signed the Agreement for the Company, claimed that he thought it covered only one employee, Todd Downey, who worked part-time for a few months in 2004 and 2005. The district court found that this understanding was belied by the Agreement's "clear language," which "absolutely"

(Continued on following page)

After Jagodowski left the Company, other employees took over his work. The Company failed to keep legally required records of which employees performed covered work and for how many hours, and failed to make contributions on their behalf. Pet. App. 27a.

3. In 2007, the Funds attempted to perform an audit of the Company's books and records pursuant to their standard policy. Pet. App. 27a. In September 2008, however, when the Funds had been unable to obtain the Company's cooperation in completing the audit, the Funds hired counsel. Over the next year, and before commencing litigation, counsel attempted to exact the Company's compliance with the audit process and, upon partial completion of the audit in July 2009, to persuade the Company to fulfill its obligations under the Agreement. *See* Wagner Aff. Exh. A, at 1-5, Apr. 4, 2011. The Funds' lawyers were not able to secure full compliance and the auditors were not able to complete the audit.

The incomplete audit revealed previously unreported employees' work that was covered under the Agreement. The Funds accordingly demanded payment of these delinquent contributions and related damages (including interest and liquidated damages), but their demands were unsuccessful. *See* Wagner Aff. Exh. A, at 3-4.

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established that it covered "not one employee but several *types* of employees." Pet. App. 32a-33a (emphasis in original).

Beginning with their engagement of auditors and counsel until the commencement of this action, the Funds paid $4949.35 in attorney's fees and $3497 in audit fees, plus incidental costs, in their attempt to exact the Company's compliance with the Agreement. Wagner Aff. Exh. A, at 1-5, & Exh. B, at 1-2; Pl. Exh. 12, at 1. After commencing the action, the Funds incurred more than $120,000 in additional legal fees and an additional $3040 in audit fees, plus costs, through March 31, 2011. Wagner Aff. Exh. A, at 5-36, & Exh. B; Pl. Exh. 12, at 1-2.

B. Proceedings in the District Court

1. On September 25, 2009, the Funds filed suit in the United States District Court for the District of Massachusetts. The complaint sought unpaid benefit contributions, union dues deductions, interest, and liquidated damages (collectively, "remittances"); production of further records for auditing; and recovery of the auditing fees, legal fees, and other expenses attributable to collecting the remittances (collectively, "collection expenses"). Comp., Prayer for Relief ¶¶ 1-6.

2. During a three-day bench trial, the district court noted that the issue of "attorney's fees is part of the damages potentially." 3 Trial Tr. 51:19-20, Feb. 28, 2011. The court therefore gave the Funds the option of making their submission for fees and other collection costs with their proposed findings of fact and conclusions of law or waiting for the outcome of

the claim for remittances. The Funds chose the former and, pursuant to a three-week extension of time, submitted their motion for fees on April 5, 2011, more than two months before the court rendered its decision on the remittances claim. They sought compensation for auditing and legal fees, as well as costs (including disbursements, travel expenses, filing fees, and the like) incurred while trying to collect the remittances – both out of court, before the litigation commenced, and during the litigation. Wagner Aff. 2-4.

On June 17, 2011, the district court issued an order awarding the Funds $26,897.41, representing unpaid contributions for work performed by Jagodowski, interest, and liquidated damages. The court denied recovery, however, for work performed by employees whose identities and hours were missing from the Company's records. The court stated that it would rule on the claim for attorney's fees in a separate memorandum. Pet. App. 38a.

On July 25, 2011, the district court issued a memorandum and order awarding the Funds $34,688.15 in attorney's fees, auditing fees, costs, and expenses incurred both before and during the litigation. Pet. App. 47a & n.1. At the end of its order, the court stated for the first time that "[t]his case may now be closed." *Id.* at 47a.

C. Proceedings on Appeal

On August 15, 2011, the Funds filed a notice of appeal. One week later, the Company cross-appealed both the June order awarding damages for failure to make contributions for Jagodowski and the July order awarding collection expenses, including attorney's fees. The Company filed no response when the clerk of the court issued an order to show cause relating to the timeliness of the appeal as to the June order. *See* Order of Court, Oct. 3, 2011. The court of appeals then *sua sponte* ordered the parties to submit briefs as to the timeliness of the Funds' appeal. Order of Court, Jan. 24, 2012. The Company argued that the appeal was untimely as to the order on remittances, because it was filed more than thirty days after that order was issued. Pet. App. 6a. At oral argument, however, counsel for the Company admitted that other circuits' supposedly contrary decisions did not "include pre-litigation attorney's fees," so a holding in favor of the Funds "wouldn't conflict with any of these other circuits." Oral Arg. Tr. 8 (1st Cir. July 31, 2012) (unofficial).[4]

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[4] After petitioners' counsel twice cited supposedly contrary decisions of the Fifth, Seventh, and Ninth Circuits, he conceded that those decisions were not on point:

Judge Dyk: Do those other circuits address cases similar to this where the costs – the attorney's fees that are being claimed include pre-litigation attorney's fees?

Attorney Aguiar: I don't believe they do, your Honor. . . .

(Continued on following page)

The court of appeals held that the Funds' appeal was timely as to both issues. The court held that the fees here "f[e]ll beyond the line drawn by" *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), because they were "an element of the [Funds'] contractual damages" rather than the typical statutory attorney's fees considered in *Budinich*. Pet. App. 8a, 9a. Attorney's fees under fee-shifting statutes are "collateral" to the main action because they are awarded not to remedy a pre-litigation injury, but as the "prevailing part[y's]" costs of bringing the litigation. *Id.* at 6a, 8a-9a. They therefore do not undermine the finality of a prior decision on the merits.

In *Budinich*, this Court held that an order resolving the merits of a case was final, although a request for "prevailing party" attorney's fees under a statute remained unresolved. The court of appeals in this case rejected petitioners' argument that "this case is on a par with *Budinich*." Pet. App. 9a; *see also id.* (petitioner's argument is "of little moment here"). The court explained that in this case, unlike in *Budinich*, the complaint sought to recover collection expenses

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Judge Dyk: So, if we were to hold hypothetically that where there is an attorney's fees claim that is for more than the litigation costs and that that aspect of the claim renders the original judgment non-final, that wouldn't conflict with any of these other circuits.

Attorney Aguiar: That's correct, your Honor.

Oral Arg. Tr. 8 (1st Cir. July 31, 2012) (unofficial).

that are independent of litigation "as an element of damages in the event of a breach." *Id.* at 8a. Under the collective bargaining agreement, "[t]here is no requirement that suit be brought and, thus, there is no requirement that the Funds be prevailing parties." *Id.* at 9a. The right asserted here "would apply when a fund attempts to collect contributions from an employer, who, after a period of recalcitrance, yields to the fund's demands before suit is brought." *Id.* Indeed, the fees sought "included fees for legal services rendered *prior to* suit." *Id.* at 8a (emphasis added).

As a result, the court of appeals held that the collection expenses, including fees, were "part of the merits of [the Funds'] contract claim," and that "no final judgment [was] entered until the district court resolved the contract-based claim for attorneys' fees." Pet. App. 9a. The notice of appeal was filed within thirty days of the district court's second and final order, and it therefore was "timely as to all the issues raised." *Id.*

On the merits, the court of appeals held that the district court erred in denying respondents recovery of delinquent contributions for covered work performed by unidentified employees. Under federal law, employers must maintain employee records sufficient to determine benefits due. Since the Funds proved that covered work was performed, the burden shifted to the Company to demonstrate which hours represented covered work and which did not. The court of appeals therefore remanded to the district court to

make this determination in the first instance. Pet. App. 11a-17a.

The court of appeals did not address the Funds' appeal of the fee award because the district court would have to recalculate it on remand, along with redetermining the correct amount of delinquent contributions. Pet. App. 17a-18a. The court of appeals also denied petitioners' cross-appeal on attorney's fees, without prejudice.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with *Budinich* or the decision of any other court of appeals. As the court of appeals correctly concluded, under the specific language of the Agreement, the Funds' claim for collection expenses, like its claim for remittances, was part of the injury giving rise to the action; it was in no sense "collateral" to the remittances claim. This case is therefore "beyond the line drawn by the *Budinich* Court." Pet. App. 9a.

The Company conceded during oral argument below that in this situation, a decision by the First Circuit that the appeal was timely would not conflict with other circuits' decisions. To assert a conflict, the Company now ignores the critical distinction between the typical request for statutory attorney's fees, which *Budinich* addresses, and the damages claim for collection expenses here, which includes attorney's fees as one of its several components. This Court

considered the request for attorney's fees in *Budinich* to be "collateral" because, as is common in fee-shifting statutes, the fees "[did] not remedy the injury giving rise to the action"; rather, they were (a) incurred "for the litigation at hand" and (b) awarded to a "prevailing party." 486 U.S. at 200-01.

By contrast, the Funds' claim for collection expenses under the specific terms of the Agreement is an independent and stand-alone claim to recover for an injury that accrued before, and gave rise to, the litigation. It is, in other words, a self-sufficient claim "on the merits." As it turned out, the Funds had to sue and obtain a judgment to obtain compensation, rather than collect what was due them under the Agreement without litigation or by means of a settlement. But the Funds' claim for damages to compensate them for the collection expenses – which the Agreement obligated the Company to pay – was neither "for the litigation at hand" nor dependent on being a "prevailing party"[5] in any underlying litigation. As such, it could not in any sense be considered collateral and so had to be resolved before the decision on remittances could become final.

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[5] In this context, "prevailing party" is a term of art. When an entitlement to fees is based on a "prevailing party" requirement, a litigant must first obtain a "*judicially sanctioned* change in the legal relationship of the parties" before an award of attorney's fees is proper. *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (emphasis added).

There is no conflict in the circuits. Eight circuits that have addressed the question of finality in the posture of this case have arrived at the same conclusion as the court below. In two other circuits' cases, neither the briefs nor the opinions addressed whether the availability of pre-litigation fees and the absence of a "prevailing party" requirement were relevant. Accordingly, the question presented by this case remains open in those circuits.

Even if there were tension among the circuits' approaches, it is by and large decades old and stale. No court of appeals has considered the question sufficiently important or subject to conflict to grant en banc review. The courts of appeals are thus free to reconcile any disagreement themselves.

The decision below is also supported by practical considerations of judicial efficiency, especially the policy against piecemeal appeals. These considerations motivated the Advisory Committee to amend the relevant Federal Rules of Civil and Appellate Procedure to resolve problems that arose in the aftermath of *Budinich*. The changes, as explained in the Advisory Committee Notes, rest on the premise that *Budinich* does not apply to a contractual claim for fees like the one in this case.

Finally, there is no risk that any supposed variation among the circuits would lead to forum shopping or inequity. Litigants do not choose a forum based on the jurisdiction's rule on finality, and the applicable rule is clear within each circuit that has addressed

the issue. Any need for uniformity in an area like this would be better addressed by amending the Federal Rules of Civil and Appellate Procedure.

I. THERE IS NO CONFLICT IN THE CIRCUITS

The two crucial factors present in this case are ignored by petitioners and are absent from or overlooked in the decisions that petitioners claim create a conflict in the circuits. The courts that have addressed these two factors have uniformly agreed with the decision of the court of appeals in this case.

First, the contract in this case specifically obligates the Company to pay the Funds' collection expenses apart from and in addition to fees or costs incurred "for the litigation at hand." *Budinich*, 486 U.S. at 201. Thus, in contrast to a typical request for fees pursuant to a statute, the injury became cognizable before the Funds took any concrete steps toward litigation. Second, the contract does not condition the award of collection expenses on status as a "prevailing party" in litigation. Accordingly, the Funds did not have to obtain a court-enforced judgment on any underlying litigation before the right to collect the pre-litigation expenses accrued.

Together, these two factors make the Funds' entitlement to fees a self-sufficient claim. Such a claim can stand alone and be litigated independently of other contract claims. First, had the Company compensated the Funds for the unpaid remittances

voluntarily or pursuant to a settlement, the claim for collection expenses still could have been brought, on its own. By contrast, under a traditional fee-shifting framework involving fees "for the litigation," the Funds would not have had the right to recover such pre-litigation fees. Second, the Agreement contemplated that the Funds could recover the fees and other collection expenses in the case of a voluntary payment or settlement. Under a traditional fee-shifting framework, that would be impossible because there would be no "judicially sanctioned" relief that would give the Funds the requisite "prevailing party" status. *Buckhannon*, 532 U.S. at 605. These two factors thus combine to create a claim that is necessarily on the merits, and it does not become collateral simply because there is also a separate remittances claim.

Petitioners cannot point to any court that has addressed these factors and still reached a decision contrary to the First Circuit's below. Seven other circuits already apply the same rule; those that do not have yet to consider the effect of the two key characteristics of the type of claim presented here. Any alleged tension among the circuits' reasoning is not entrenched and has largely evaporated over the last two decades in the wake of the 1993 amendments to the Federal Rules of Civil and Appellate Procedure.

A. Eight Circuits Agree That Claims for Pre-Litigation Fees That Are Not Contingent on "Prevailing Party" Status Are Not Collateral

1. As petitioners acknowledge, the Third, Fourth, and Eighth Circuits agree with the court below that a judgment is not final if it leaves a self-sufficient claim for attorney's fees unresolved. *See* Pet. 13-15; *see also, e.g.*, *Gleason* v. *Norwest Mortg., Inc.*, 243 F.3d 130, 137-38 (3d Cir. 2001) (recognizing that, unless the contract requires being a "prevailing party" in litigation, an outstanding contractual claim for attorney's fees prevents finality because it is "an integral part of the contractual relief sought"); *Vargas* v. *Hudson Cnty. Bd. of Elections*, 949 F.2d 665, 669-70 (3d Cir. 1991) (claims were not for fees "for that litigation" and claimant did not seek "*recovery . . . as a prevailing party in the litigation*") (emphasis added); *Carolina Power & Light Co.* v. *Dynegy Mktg. & Trade*, 415 F.3d 354, 356, 360 (4th Cir. 2005) ("contractual provision . . . [wa]s not limited to expenses incurred during the underlying litigation," and claim was "[u]nlike the circumstances in *Budinich*, where the attorneys fee award depended on whether the claimant was a prevailing party"); *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1049 (8th Cir. 1991) ("motion properly sought . . . pre-litigation fees" and "determination of the question of fees and costs" preceded – and therefore did not depend on – a determination of whether plaintiff was "a prevailing party").

2. Petitioners correctly note that this case would come out the same way in the Eleventh Circuit. *See* Pet. 16. In *MedPartners*, the Eleventh Circuit found that an unresolved claim for attorney's fees, including fees for services rendered during a previous arbitration proceeding, precluded the district court's decision from becoming final. *Brandon, Jones, Sandall, Zeide, Koh, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349, 1354-55 (11th Cir. 2002) (per curiam) ("The district court's Omnibus Order . . . 'retain[ed] jurisdiction . . . to award or confirm the award of attorneys' fees and costs of this litigation *and the arbitration*'. . . .") (emphasis added).

3. While petitioners claim that the Tenth Circuit has not resolved the question presented, Pet. 20 n.2, in fact the Tenth Circuit also has held that a decision is not final until the district court resolves a self-sufficient claim for attorney's fees. In *North American Specialty Insurance Co.* v. *Correctional Medical Services, Inc.*, an insurer had settled a tort case on behalf of the defendant and then filed a separate suit to recoup the costs of the settlement from the defendant, arguing that it had no duty to defend or indemnify. 527 F.3d 1033, 1034 (10th Cir. 2008). The defendant cross-claimed for legal expenses it had incurred in the tort case. *Id.* at 1035. The district court entered judgment for the defendant but did not quantify the fee award. *Id.*

On appeal, the Tenth Circuit held that the judgment was not final before the claim for fees was resolved. 527 F.3d at 1038. The attorney's fees were

incurred in the prior litigation against the tort plaintiff. The court held that "the costs and attorney's fees [the defendant] expended in defending the [prior] litigation represent compensatory damages for [the insurer's] breach of its insurance contract." *Id.* at 1038-39. Accordingly, the court found that the fees claim was "inseparable from the merits" and therefore finality had not yet attached. *Id.* at 1038 (internal quotation marks omitted).

4. In the Fifth Circuit, a claim for attorney's fees like the one in this case is considered part of the merits of a case. In the *Deus* case, the plaintiff changed lawyers midway through the litigation, and his original lawyers intervened to recover fees owed under a retainer agreement. *Deus* v. *Allstate Ins. Co.*, 15 F.3d 506, 520-21 (5th Cir. 1994). The court stressed that the intervenors were not "seeking . . . attorneys' fees associated with filing its current intervention motion," so the fees were "not 'for the litigation in question.'" *Id.* at 523. In addition, the fees owed were "not, as was the fee claim in *Budinich*, the result of fee-shifting between prevailing and losing parties." *Id.* at 522. Thus, the fees were an "independent claim on the merits" and so "'remed[ied] the injury giving rise to the action.'" *Id.* at 521 (quoting *Budinich*, 486 U.S. at 200); *see also id.* at 523 (noting that the case is "similar to" the Third and Eighth Circuits' decisions in *Vargas* and *Justine Realty*, respectively).

Petitioners do not cite *Deus*. Instead, they rely on an earlier Fifth Circuit decision that did not involve

the two critical criteria – whether the attorney's fees accrued before the litigation at hand and whether they were contingent upon being a "prevailing party" in litigation. Pet. 18 (discussing *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197, 1198-99 (5th Cir. 1990)). Thus, *First Nationwide Bank* is inapposite. Under its later decision in *Deus*, the Fifth Circuit would have agreed with the court of appeals' decision in this case.

5. The Ninth Circuit applies the same rule as the Fifth Circuit. In a suit to enjoin an adverse judgment from an administrative hearing, the defendant counterclaimed for attorney's fees incurred during the earlier hearing. *Hacienda La Puente Unified Sch. Dist.* v. *Honig*, 976 F.2d 487, 490 (9th Cir. 1992) (Individuals with Disabilities Education Act claim). The district court first ruled on the injunction, and later awarded fees in a separate order. *Id.* at 490 n.2.

The Ninth Circuit held that the decision became final only after the fees were resolved. 976 F.2d at 490 n.2. First, the counterclaim "did not involve fees pertaining to the district court litigation," but only "fees incurred during the course of the [prior] administrative proceedings." *Id.* at 490 n.2, 494. Second, the defendant's right to recover fees did not turn on whether he prevailed in the district court litigation, but only on "prevail[ing] *in the administrative proceedings*." *Id.* at 494 (emphasis added). Accordingly, "the rule separating for purposes of finality a decision on the merits from a decision on attorney's fees 'for

the litigation at hand' [wa]s not applicable [t]here." *Id.* at 490 n.2.[6]

Petitioners fail to cite *Hacienda La Puente*. Instead, they assert a conflict by relying on another Ninth Circuit decision that did not consider whether the contractual fee provision contained a "prevailing party" requirement. Pet. 19-20 (discussing *United States ex rel. Familian Northwest, Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 954-55 (9th Cir. 1994)).[7] Indeed, *Familian* cited with approval the Fifth Circuit's decision in *Deus* and the Third Circuit's decision in *Vargas* for the proposition that "where attorney's fees are part of the merits of a claim (for example, where the damages sought include attorney's fees from a prior litigation), a judgment does not become final until those fees have been quantified." *Id.* at 955 n.2. In the circumstances of this case, *Hacienda La Puente* (not *Familian*) would control and would dictate the same result in the Ninth Circuit as the decision below.

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[6] Similarly, the Ninth Circuit had previously allowed a prevailing party in an administrative proceeding to bring an independent claim to recover attorney's fees incurred in the administrative proceeding. *McSomebodies* v. *Burlingame Elementary Sch. Dist.*, 897 F.2d 974, 975 (9th Cir. 1989).

[7] While *Familian* purported to disagree with the Eighth Circuit's decision in *Justine Realty*, it did not recognize or discuss the fact that the contract in *Justine Realty* did not require the party seeking fees to prove that it was a "prevailing party" in litigation. Especially given *Hacienda La Puente*, that oversight would not prevent the Ninth Circuit from following the majority of circuits in a future case that was similar to this one.

B. The Second and Seventh Circuits Have Never Considered the Two Key Components of the Type of Claim Presented Here

The Second and Seventh Circuits have yet to consider the type of contract at issue here. The ability to recover (1) for fees incurred before the "litigation at hand" and (2) without being a "prevailing party" in litigation fundamentally alters the nature of the claim for attorney's fees. Each court that has recognized the presence of both factors has understood that, together, they give rise to a claim on the merits. Although petitioners assert that the Second and Seventh Circuits disagree with the court of appeals below, the cases petitioners cite did not discuss the presence of these factors or address whether they were relevant to the issue of appellate jurisdiction. Those courts accordingly remain free to decide a future case like this one in accord with the First Circuit's decision here.

1. In *O & G Indus., Inc.* v. *Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 156-57 (2d Cir. 2008), Amtrak had been sued for injuries to highway workers by one of Amtrak's trains. Amtrak brought a third-party indemnity complaint against the highway contactor, seeking indemnification for liability and for Amtrak's costs, including attorney's fees. *Id.* at 156. The district court held in favor of Amtrak, but did not quantify the amount of the fees until later, after the notice of appeal had been filed. *Id.* at 167. The Second Circuit "dismiss[ed] for lack of appellate jurisdiction

the portion of O & G's appeal challenging the district court's grant of attorneys' fees and costs incurred in [the first phase] of the trial." *Id.* It is unclear whether this case involved pre-litigation fees at all, and the court did not discuss the significance of that factor, or the existence or significance of any "prevailing party" requirement in the indemnification agreement. Accordingly, the Second Circuit has not yet determined the proper treatment of a case like this one involving pre-litigation fees not subject to a "prevailing party" requirement. It therefore remains free in a future case to agree with the First Circuit's resolution here.

2. The same is true of the Seventh Circuit cases on which the Company relies. In *Continental Bank* v. *Everett*, 964 F.2d 701, 702-03 (7th Cir. 1992), and *Matter of Stoecker*, 5 F.3d 1022, 1026 (7th Cir. 1993), the Seventh Circuit held that district court orders that left open contractual attorney's-fee issues were final and appealable. Neither case, however, mentioned or discussed whether the plaintiffs sought fees that were not "for the litigation at hand" or whether the contract imposed a "prevailing party" requirement.[8] Moreover, *Matter of Stoecker* relied only on two

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[8] In purporting to disagree with *Justine Realty*, *Continental Bank* evidenced its misunderstanding of the issue presented by mischaracterizing the Eighth Circuit's decision as broadly holding that, "when fees are provided by contract, judgment on the merits is not appealable until fees have been quantified." 964 F.2d at 703. *Justine Realty*'s actual holding was much narrower and depended on the facts that (a) the case involved

(Continued on following page)

inapposite cases: (1) a Seventh Circuit case involving fees that were for the litigation and dependent upon "prevailing party" status, *see Herzog Contracting Corp.* v. *McGowen Corp.*, 976 F.2d 1062, 1065 (1992); and (2) a Third Circuit case that dealt with statutory fees for the litigation, *see Colon* v. *Hart*, 941 F.2d 242, 244-45 (3d Cir. 1991). There was no reason in either case to consider whether the type of contractual fees at issue here would require a different conclusion on finality, and *Matter of Stoecker* failed to consider that question on its own.

In sum, the Seventh Circuit has not addressed the limiting principle that applies in this case: that a district court order leaving open contractual claims for pre-litigation fees with no requirement of proving "prevailing party" status is non-final. The Seventh Circuit therefore remains free to join the court of appeals here when an appropriate case arises.[9]

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pre-litigation fees and (b) no showing of "prevailing party" status was necessary. *See supra* p.15.

[9] The parties in *Continental Bank* and *Matter of Stoecker* did not argue, and the Seventh Circuit did not consider or decide, whether the fees sought were for pre-litigation expenses, whether they depended on being "prevailing parties" in litigation, or whether those factors would have any significance to the analysis. This Court has "often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

C. The Alleged Disagreement Is Neither Entrenched Nor Ripe for Review

Even if there were tension among the circuits, the minority position is not entrenched and review of this case would be premature. First, no court of appeals has decided the issue presented en banc. The courts of appeals may thus harmonize any conflict on their own. Indeed, when the Seventh Circuit is an outlier, even a panel of that court may "overturn Circuit precedent for compelling reasons," in "the interest [of] avoiding unnecessary intercircuit conflicts." *Russ* v. *Watts*, 414 F.3d 783, 788 (7th Cir. 2005).

Second, the Seventh Circuit's decision in *Continental Bank* preceded the 1993 Amendments to the Federal Rules of Civil and Appellate Procedure. Those Amendments addressed problems in the wake of *Budinich* and were based on the premise that certain claims for fees under a contract, like the claim in this case, are not collateral. *See infra* pp.30-35. Since 1993, courts have relied on the Amendments and the Advisory Committee's accompanying explanation in deciding that unresolved contractual claims for attorney's fees are part of the underlying action and preclude a final judgment. *See, e.g.*, *Carolina Power*, 415 F.3d at 358-59.

Whatever the rule may have been when *Continental Bank* was decided, it was unmoored by the Amendments. The Seventh Circuit's 1993 discussion in *Matter of Stoecker* neither mentioned the 1993

Amendments nor involved a self-sufficient fee claim. The parties in the Second Circuit's *O & G Industries* case did not brief the 1993 Amendments – indeed, the Second Circuit raised the timeliness issue *sua sponte* – and the Second Circuit did not mention them in its opinion. Both circuits may reconsider their positions in light of the 1993 Amendments when given an opportunity to do so.

Third, the Second and Seventh Circuits ruled in the context of appeals that were brought *too early*, after an initial order but before a later order resolving attorney's fees. *O & G Indus.*, 537 F.3d at 167-68; *Matter of Stoecker*, 5 F.3d at 1026; *Continental Bank*, 964 F.2d at 702-03. Petitioners themselves acknowledge that the equities are quite different in that posture, because a contrary decision "would have affected only *when* the appeal could be taken, not *whether* it could be." Pet. 29-30. Both circuits thus viewed their rulings as "promot[ing] the interests of judicial economy." *O & G Indus.*, 537 F.3d at 168 n.11; *accord Matter of Stoecker*, 5 F.3d at 1026 (stressing the need to "spare [appellate courts] the burden of duplicative appeals").

The interests of judicial economy look quite different, however, in the posture of this case: A ruling that the appeal was untimely would require the dismissal of a meritorious appeal entirely and require future litigants to bring piecemeal appeals. When faced with such a case, along with an argument raising the critical importance of pre-litigation fees without a "prevailing party" requirement, the Second

and Seventh Circuits may well eliminate any remaining tension among the circuits by expressly agreeing with the First Circuit in this case.

II. THE DECISION BELOW IS CONSISTENT WITH *BUDINICH*, THE 1993 AMENDMENTS TO THE FEDERAL RULES OF CIVIL AND APPELLATE PROCEDURE, AND 28 U.S.C. § 1291

Petitioners argue that the decision below is "fundamentally inconsistent" with *Budinich*'s "bright-line" rule. Pet. 20. But the appeal in this case was not governed by *Budinich*. This Court confirmed *Budinich*'s limitations one Term after it was decided, in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989). And *Budinich*'s limited scope was further acknowledged four years later when the Federal Rules of Civil and Appellate Procedure were amended in the wake of *Budinich*.

A. This Case Falls Beyond *Budinich*'s Scope Because It Involves Pre-Litigation Expenses and Does Not Require Being a Prevailing Party in Litigation

By its terms, *Budinich* dealt with typical statutory attorney's fees, incurred "for the litigation at hand" and awarded to the "prevailing party" in that litigation. 486 U.S. at 200-01. "Such an award does not remedy the injury giving rise to the action, and

indeed is often available to the party defending against the action." *Id.* at 200. Those characteristics are typical of fee-shifting statutes and were crucial to the Court's reasoning and holding. These same characteristics may well not be typical of contractual fees; they were not true of the collection expenses covered by the Agreement in this case.

1. *Budinich* involved a state-law claim for employment compensation under a Colorado statute that provided for attorney's fees for the "winning party," to be taxed as part of the costs of the action. 486 U.S. at 197. After the district court entered judgment on a jury verdict awarding compensatory damages to the plaintiff (but less than he sought), the plaintiff filed a post-judgment motion for attorney's fees pursuant to the statute. *Id.* After the district court awarded those fees in a later order, the plaintiff appealed both the attorney's fees and damages awards. *Id.* at 198. The appeal was filed within thirty days of the order on attorney's fees but more than thirty days after the judgment on compensatory damages. *Id.* at 197-98.

This Court held that the plaintiff's appeal was untimely as to the damages claim, *Budinich*, 486 U.S. at 203, based on several key characteristics of the attorney's fees at issue in *Budinich*, which are typical of attorney's fees authorized by statute. The fees were not meant to "remedy the injury giving rise to the action"; instead, the right to receive them arose from and depended on being a "prevailing party" on the employment compensation claim in that action. *Id.* at

200. These characteristics were what made the fees in *Budinich* "'collateral to' and 'separate from' the decision on the merits." *Id.* (quoting *White* v. *New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 451-52 (1982)). *Budinich* thus held that when a statute entitles a "prevailing party" to recover fees, "an unresolved issue of attorney's fees *for the litigation in question* does not prevent judgment on the merits from being final." *Id.* at 200, 202 (emphasis added).

When the factors relied upon in *Budinich* are present, the fee request is truly a collateral matter that need not be resolved before going forward with an appeal. Where there is a "prevailing party" requirement, the obligation to pay attorney's fees arises from the litigation itself; it is not a preexisting obligation that could have been the basis of a claim on its own. Similarly, when a litigant is entitled to recover fees only "for the litigation in question," there can be no claim for non-litigation fees, like those incurred in an attempt to settle a dispute out of court.

2. Here, by contrast, the Agreement explicitly provided that "[a]ny costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting [e]mployer." Pet. App. 52a. This provision neither limits recovery to fees "for . . . litigation" nor conditions recovery on being a "prevailing party" in court.

Before filing suit, the Funds incurred legal, accounting, and other expenses in their futile attempt to collect the delinquent contributions. They included

a claim for those collection expenses in their complaint, based on the express terms of the Agreement, along with their claim for the remittances. That claim was as much a part of the Funds' case as the claim for remittances. It was also a breach-of-contract claim, independent of (but on a par with) the remittances claim. The district court's award of damages for the remittances remedied one injury; its fee award remedied the other. Under these circumstances, the fee issue was not collateral; and until it was resolved, the district court's order was not final and appealable.

Indeed, the Funds would have had a cognizable claim for the collection expenses under the Agreement without having the Company's liability adjudicated in court. Had the Company admitted its default or paid the remittances in response to the Funds' collection efforts, the Agreement still would have required the Company to compensate the Funds for its collection expenses. If the Company had refused to pay them, the Funds could have sued to recover those expenses alone, without (and independent of) any claim for remittances.

In such a suit, the claim for the collection expenses could not possibly be deemed "collateral" to the merits; it would *be* the merits. The Company's default on the expenses would constitute the sole "injury giving rise to the action." *Budinich*, 486 U.S. at 200; *cf. Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107-08 (1998) (acknowledging that "investigation costs . . . incurred prior to the litigation" would constitute a legally cognizable injury that

"would assuredly support Article III standing"); *McSomebodies*, 897 F.2d at 975 (independent claim could be brought in district court for attorney's fees, costs, and expenses incurred in prior administrative proceeding). The coupling of the Funds' cognizable claim for pre-litigation collection expenses with their claim for remittances did not transform it from a claim on the merits into a collateral claim.

3. This Court's decision in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), decided one Term after *Budinich*, confirms that this case falls beyond *Budinich*'s outer limits. In *Osterneck*, the Court held that a motion for prejudgment interest is not "collateral" because it "involves . . . reconsideration of matters encompassed within the merits" of a case. *Id.* at 176. The Court distinguished *Budinich* on the ground that prejudgment interest is "part of the compensation for the plaintiff's injury," unlike typical attorney's fees, which traditionally were regarded "as an element of costs awarded to the prevailing party." *Id.* at 175. The collection expenses in this case, like prejudgment interest, were part of the compensation for the Funds' injury.

Moreover, petitioners' claim that *Budinich* "squarely rejected the 'merits'/'nonmerits' distinction," Pet. 11, is belied by *Osterneck*. The later decision relied on that distinction as the basis for its holding, distinguishing prejudgment interest from typical attorney's fees or costs.

B. Petitioners' Argument Conflicts With the Federal Rules of Civil and Appellate Procedure and Undermines Their Goal of Judicial Efficiency

Petitioners' argument is contradicted by Federal Rules of Civil Procedure 54 and 58, which govern the finality and appealability of district court orders, and by the Advisory Committee's explanation of the amendment of these Rules in the wake of *Budinich*. Because that decision threatened to cause inefficiency in the form of piecemeal appeals, the Rules were amended so that "when possible, district courts should act to facilitate a single appeal that covers both disposition on the merits and disposition of attorney fee issues." 15 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3915.6 (2d ed. 2012).[10] The Rules and the Advisory Committee's notes are based on the premise that in a case like this, there would be no final judgment until the district court ruled on the Funds' claim for collection expenses under the Agreement.

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[10] Federal Rule of Appellate Procedure 4 was amended at the same time to address the same concerns, and to conform to *Budinich* and amended Rules 54 and 58. Rule 4(a)(4) specifically "excludes motions for attorney's fees from the class of motions that extend the filing time" for appeal, unless a district court extends the time for appeal pursuant to Rule 58. FED. R. APP. P. 4(a)(4) advisory committee note (1993); *see infra* pp.32-33.

1. Federal Rule of Civil Procedure 54(b) provides:

> When an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims . . . only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, *however designated*, that adjudicates fewer than all the claims . . . does not end the action as to any of the claims. . . .

FED. R. CIV. P. 54(b) (emphasis added). The rule was adopted to promote judicial efficiency by "re-establish[ing]" the "ancient policy" against piecemeal litigation "with clarity and precision." FED. R. CIV. P. 54(b) advisory committee note (1946).

The finality rule announced in *Budinich* threatened to undermine this policy by requiring piecemeal appeals "in the large number of actions in which *prevailing parties* may be entitled to such awards." FED. R. CIV. P. 54(d) advisory committee note (1993) (emphasis added). The Advisory Committee sought to solve the problem, in cases controlled by *Budinich*, in part by amending Rule 54 to provide that a request for attorney's fees must be made by motion within fourteen days after the court has entered final judgment. FED. R. CIV. P. 54(d)(2).[11]

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[11] This deadline was adopted "'in large part to avoid piecemeal appeals of merits and fees questions.'" *Miltimore*

(Continued on following page)

Under amended Rule 54(d), however, merely filing a motion for fees would "not affect the finality or the appealability of a judgment." FED. R. CIV. P. 54(d) advisory committee note (1993). Accordingly, the Advisory Committee also amended Rule 58 to permit the district court to "suspend the finality" of an order "to resolve a motion for fees" governed by amended Rule 54(d). *Id.* Before its amendment, Rule 58 directed that the "entry of the judgment shall not be delayed for taxing of costs." FED. R. CIV. P. 58 (1963). "To conform to . . . *Budinich*," *see* FED. R. APP. P. 4(a)(4) advisory committee note (1993), Rule 58 was amended to provide that "[o]rdinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs *or award fees*." FED. R. CIV. P. 58(e) & advisory committee note (1993) (emphasis added). To avoid piecemeal appeals, however, the crucial qualification was added that "if a timely motion for attorney's fees is made under Rule 54(d)(2)," the court may delay the finality of its judgment on the merits until the motion for fees is decided.[12] *Id.*

Sales, Inc. v. *Int'l Rectifier, Inc.*, 412 F.3d 685, 689 (6th Cir. 2005) (quoting *Weyant* v. *Okst*, 198 F.3d 311, 315 (2d Cir. 1999)).

[12] More precisely, Rule 58(e) provides that the district court may "order that the motion [for fees] have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." FED. R. CIV. P. 58(e). Rule 59 allows a court to delay the finality of a judgment pending consideration of a motion to alter or amend the judgment.

(Continued on following page)

In short, by requiring a fee request governed by *Budinich* to be brought within fourteen days, and by giving the district court discretion to suspend finality to rule on that request, the amendments enabled district courts to facilitate a unified appeal from separate orders on merits and fees. *See*, *e.g.*, *Mendes Junior Int'l Co.* v. *Banco do Brasil*, 215 F.3d 306, 313 (2d Cir. 2000).

2. In adopting these amendments in reaction to *Budinich*, however, the Advisory Committee expressed its understanding that claims for fees arising from contracts, like those here, were not governed by *Budinich*, and so there was no need to amend the rules for cases involving such claims. Thus, amended Rule 54 by its terms does not apply when "the substantive law requires those fees to be proved at trial as an element of damages." FED. R. CIV. P. 54(d)(2)(A). As an example of such fees, the Advisory Committee cited claims for attorney's fees based on the "terms of a contract," which typically are claimed in a pleading. FED. R. CIV. P. 54(d)(2) advisory committee note (1993). The Advisory Committee viewed claims for fees like those in this case as unaffected by *Budinich* and not in need of a corrective amendment. The premise of the changes is that in a case like this one,

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The Advisory Committee was clear that its goal was efficiency, which would be achieved by having "appeals relating to the fee award . . . heard at the same time as appeals relating to the merits of the case." FED. R. CIV. P. 58 advisory committee note (1993).

where a district court neither enters a partial final judgment nor specifically states that there is no just reason for delay, its initial order is not a final, appealable judgment under Rule 54(b).

3. The operation of the amended Rules demonstrates the fallacy of petitioners' argument in two alternative ways. First, since Rule 58 applies only to fee claims subject to Rule 54(d)(2), it does not address fees that constitute "an element of damages," like those based on "the terms of a contract." FED. R. CIV. P. 54(d)(2) advisory committee note (1993). The Advisory Committee saw no need to address such fees because, as explained above, it did not think *Budinich* applied to them.

If this Court were to reject the Advisory Committee's view, however, and accept petitioners' argument, cases involving contractual fees would be in a procedural no-man's-land – covered by *Budinich*'s finality rule but not by the curative amendments adopted to solve the problem of piecemeal appeals that *Budinich* created.

Thus, under petitioners' argument, a district court could not avail itself of the discretion provided by Rule 58(e) to extend the time for filing a unified appeal. Instead, to permit both rulings to be appealed, it would be required either to (1) adjudicate all claims in a single order, or (2) enter partial final judgment before resolving the fee issue, which would lead to piecemeal appeals. No good reason supports such a rule, which would simultaneously deprive the

district courts of discretion that they were meant to have and burden the courts of appeals with piecemeal appeals.

C. Petitioners' Argument Undermines the Purpose of § 1291 by Fostering Piecemeal Appeals

Like the federal civil and appellate rules, the finality requirement of § 1291 "promotes judicial efficiency and hastens the ultimate termination of litigation." *United States* v. *Nixon*, 418 U.S. 683, 690 (1974). By restricting appellate review to "final judgments," § 1291 "prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). Treating a claim for contractual attorney's fees as "collateral to" the decision on the merits, even when the claim was stated in the complaint and sought as damages for breach of contract, would increase the frequency of piecemeal appeals, thereby frustrating rather than promoting the purposes of § 1291.

III. THE QUESTION PRESENTED IS NOT IMPORTANT

Even if the circuits differed in their approaches, such variation would not warrant this Court's time and attention. Once a circuit lays down its rule, litigants within that circuit can predict the finality

and appealability of attorney's fee awards. National uniformity is not essential, because there is no danger of forum shopping or inequity. The better means of achieving national uniformity in this area, in any event, would be by amending the Federal Rules of Civil Procedure – as occurred after *Budinich*.

1. Not all procedural rules require nationwide uniformity, especially if there is no prospect of forum shopping or inequity. Litigants do not choose a forum based on its appellate court's rule on the finality of orders. *Cf. Hanna* v. *Plumer*, 380 U.S. 460, 469 n.11 (1965) (rejecting the idea that a party might choose one forum over another based on a different service-of-process rule that might possibly result in a default judgment).

2. If there is a need for uniformity, this Court should achieve it not in its adjudicative capacity by granting certiorari, but in its rulemaking capacity, subject to congressional approval, by amending the Federal Rules of Civil and Appellate Procedure. *See* 28 U.S.C. § 2072. This Court has previously recognized, albeit in a different context, that the possibility of amending rules may obviate the need for a grant of certiorari. *See, e.g.*, *Braxton* v. *United States*, 500 U.S. 344, 347-49 (1991) (declining to address a question about the U.S. Sentencing Guidelines after the U.S. Sentencing Commission indicated that it would amend the provision at issue); *see also Buford* v. *United States*, 532 U.S. 59, 66 (2001) ("Insofar as greater uniformity is necessary, the Commission can provide it.").

Here, this Court could itself initiate the amendment process and solicit input from the relevant stakeholders. "That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision." *United States* v. *Robinson*, 361 U.S. 220, 229 (1960); *see also United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 323 (1959) (finding that a procedural rule of admiralty law was "not a matter best considered by this Court in a litigation without the benefits which normally accompany intelligent rulemaking – including hearings and opportunities to submit data.").

That is especially true here, where the Advisory Committee's 1993 Amendments have already weighed and balanced the relevant policy considerations in the wake of this Court's decision in *Budinich*. "Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress." *Amchem Prods.* v. *Windsor*, 521 U.S. 591, 620 (1997). If this Court were to second-guess the Advisory Committee's conclusion that contractual claims for fees, "as an element of damages," were not affected by *Budinich*, it is likely that another round of amendments to the Federal Rules would ensue, just to come full circle to the result dictated by the decision below.

IV. THIS CASE IS A POOR VEHICLE

This case presents the question whether a district court's interlocutory order that leaves unresolved a contractual claim for damages (including pre-litigation attorney's fees) that does not depend on being a "prevailing party" in litigation is nonetheless final under 28 U.S.C. § 1291. For the reasons given above, there is no conflict in the circuits on that question, and the courts of appeals have been correctly deciding it. Insofar as there is any conflict in the circuits, as petitioners allege, on the question whether a district court's failure to resolve a claim for attorney's fees in a case involving solely litigation fees where "prevailing party" status is required, that split is not implicated in this case. Its resolution should await a case presenting that question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

RAY HALUCH GRAVEL CO., ET AL.,

Petitioners,

v.

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

The petition demonstrates that the traditional certiorari criteria weigh heavily in favor of a grant: (1) there is a circuit conflict; (2) the decision below is incorrect; (3) the question presented is important; and (4) this case is an ideal vehicle. Respondents offer only halfhearted responses to the third and fourth points. And their principal responses to the first and second points ultimately amount to the same claim: that neither this Court in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), nor any court of appeals since has held that a "merits"-based fee award—of which the award here is supposedly an example—is collateral. That claim is wrong for many reasons, including this basic one: *Budinich* squarely held that a fee award is collateral *regardless* of whether it goes to the "merits," and courts of appeals have squarely held that a contractual fee award *of the very type here* is collateral. That is reason enough to grant review.

A. There Is A Circuit Conflict

1. As the petition explains (at 11-20), four circuits have held that stand-alone awards of contractual attorney's fees are *always* collateral, one circuit has held that they are *never* collateral, and four circuits have held that they are *sometimes* collateral. Respondents contend that there is no conflict because no circuit applies *Budinich* to fees that are "damages" for "collection" expenses, as opposed to litigation "costs" of the "prevailing party." Opp. 11, 13. The idea of lower-court uniformity, as well as the hair-splitting that underlies it, would be news to the circuits that have expressly acknowledged a conflict, including the First Circuit below.

In its decision, the First Circuit observed that the issue here "has divided our sister circuits"; that "[t]he decisions of the courts of appeals *** are in disarray"; and that, while some circuits have held that "contractual claims for attorneys' fees may fall beyond the *Budinich* line," the Second, Fifth, Seventh, and Ninth Circuits "have held that *Budinich* applies to *all claims for attorneys' fees*." Pet. App. 2a, 6a (emphasis added). Likewise, in the decision that the First Circuit followed, the Fourth Circuit noted that the Fifth and Ninth Circuits "treat contractual awards of attorneys fees as collateral, *without considering whether the contract at issue provided such awards as an element of damages or as costs to the prevailing party*." *Carolina Power & Light Co.* v. *Dynegy Mktg. & Trade*, 415 F.3d 354, 362 (4th Cir. 2005) (emphasis added); see also *id.* at 363-364 (Wilkinson, J., concurring) (Fifth, Seventh, and Ninth Circuits have held that "contractual attorneys' fees provisions are *always* collateral" (emphasis added)).

The Seventh and Ninth Circuits, despite disagreeing with the First and Fourth Circuits on the merits of the question, have also acknowledged the conflict. See *Cont'l Bank, N.A.* v. *Everett*, 964 F.2d 701, 702-703 (7th Cir. 1992); *United States ex rel. Familian Nw., Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 955 (9th Cir. 1994); see also *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197, 1200 (5th Cir. 1990) ("the 'bright-line' rule announced in *Budinich* covers *all* attorneys' fees" (emphasis added)).[1]

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[1] Any suggestion that we have somehow waived the right to assert a conflict, see Opp. 7 & n.4, 10, should be categorically rejected. Only a *claim for relief* can be waived, see *Yee* v.

2. Respondents nevertheless argue that the Second and Seventh Circuits "have yet to consider the type of contract at issue here"—one that, according to respondents, authorizes a claim "on the merits" for "damages" to compensate a party for "collection" expenses. Opp. 11, 20. That is simply untrue. Decisions of both circuits have made clear—in language that is quoted in the petition (at 17-19) but ignored in the brief in opposition—that *Budinich* applies in precisely this situation.

Thus the Second Circuit has rejected "the proposition that the non-finality of an award of attorneys' fees *sought as an element of contractual damages* renders non-appealable the entire judgment in which such award is incorporated." *O & G Indus., Inc.* v. *Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 168 n.11 (2d Cir. 2008) (emphasis added). That court instead has "heed[ed] the *** admonition in *Budinich*" that no "different treatment" should be accorded to "attorney's fees *deemed part of the merits recovery*." *Ibid.* (internal quotation marks omitted; emphasis added). Citing *Budinich*, the Seventh Circuit has likewise held that "[a]n open issue about legal fees, contractual or otherwise, does not affect our jurisdiction to resolve the appeal" when the contract authorized a party "to recover the attorneys' fees *incurred in the course of collection*." *Cont'l Bank*, 964 F.2d at 702 (emphasis added).

There is accordingly no question that this case would have been decided differently in the Second and Seventh Circuits.

City of Escondido, 503 U.S. 519, 534-535 (1992); and anyway the court below acknowledged the conflict, cf. *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992).

3. As for the Fifth and Ninth Circuits, respondents claim that decisions of those courts actually support *their* position. That would not disprove the existence of a circuit conflict even if it were true, because decisions of the Second and Seventh Circuits support *our* position. And it is not true.

Respondents rely (Opp. 17) on *Deus* v. *Allstate Insurance Co.*, 15 F.3d 506 (5th Cir. 1994), in which a law firm sought to collect fees owed by its client under a retainer agreement. The Fifth Circuit held that *Budinich* did not apply because the claim for damages was "'the only game in town'" and just "happen[ed] to be for fees earned." *Id.* at 521. The rule applied in *Deus* thus was that, "[w]here an attorney *** seeks judgment against his client, it should be considered a claim for substantive relief on the merits, not a collateral issue of attorneys' fees." *Id.* at 521-522. That rule has no applicability to contractual attorney's fees of the kind awarded here.

One case involving such an award is the Fifth Circuit's *First Nationwide Bank* decision discussed in the petition (at 18), which respondents erroneously claim "did not involve" the circumstances present here. Opp. 17-18. In *First Nationwide Bank*, as in this case, the plaintiff "brought [an] action" against the defendants "to recover [a] deficiency and attorneys' fees" under a contract. 902 F.2d at 1198. And the court applied *Budinich*. *Id.* at 1199-1200.

Respondents also rely (Opp. 18-19 & n.6) on *Hacienda La Puente Unified School District* v. *Honig*, 976 F.2d 487 (9th Cir. 1992), and *McSomebodies* v. *Burlingame Elementary School District*, 897 F.2d 974 (9th Cir. 1989). Both cases involved an award of *statutory* fees, and so did not address the question

presented here. We can hardly be faulted, therefore, for "fail[ing] to cite" them. Opp. 19.

Nor is there merit to respondents' assertion that the Ninth Circuit decision we did cite (Pet. 19-20)—*Familian*—would not "control" on the facts of this case. Opp. 19. *Familian* expressly rejected the view advocated by respondents and adopted by the First Circuit—namely, that *Budinich* does not apply when "some of the *** attorney's fees arose prior to the litigation." 21 F.3d at 955.[2]

4. Respondents' fallback argument is that, even if there *were* a circuit conflict, this Court's review would be "premature." Opp. 23. That is so, according to respondents, because the four circuits that have adopted our position (a) might "harmonize any conflict on their own" through en banc review, (b) might "reconsider their positions" in light of 1993 Rules Amendments, or (c) might "eliminate" the conflict by coming out differently in cases with different "equities." Opp. 23-25.

This argument for postponing certiorari is—to put it politely—far-fetched. In fact, respondents' suggestion that a deep and longstanding conflict among nine circuits could be resolved without this

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[2] Respondents also dispute our contention (Pet. 20 n.2) that the Tenth Circuit has not addressed the question presented, citing (Opp. 16-17) *North American Specialty Insurance Co.* v. *Correctional Medical Services, Inc.*, 527 F.3d 1033 (10th Cir. 2008). But *Budinich* did not apply in that case because the attorney's fees there were "the result of a previous independent litigation." *McKissick* v. *Yuen*, 618 F.3d 1177, 1197 (10th Cir. 2010). Even if respondents were correct, that would mean only that the circuit conflict is even broader than the petition indicates.

Court's intervention—because four of those circuits (a) might grant rehearing en banc and overrule their precedents, (b) have not had sufficient opportunity to consider Rules Amendments enacted 20 years ago, or (c) might decide the same issue of statutory interpretation differently based on the "equities" of a case—is so transparently implausible that it is tantamount to a concession that this Court's intervention is needed now.

B. The Decision Below Is Incorrect

1. As the petition explains (at 20-28), the First Circuit's decision is inconsistent with *Budinich* in numerous ways and therefore erroneous. In arguing otherwise, respondents take the position that *Budinich*'s holding depended upon the "characteristics" of the "fees at issue"—namely, that they did not "remedy the injury giving rise to the action" but instead were awarded to the "prevailing party." Opp. 26 (internal quotation marks omitted). Because those characteristics are not present in this case, respondents argue, the claim for fees here is "a claim on the merits" rather than "a collateral claim." Opp. 29.

The plaintiff in *Budinich* made the same argument: that "the general status of attorney's fees for § 1291 purposes"—*i.e.*, their collateral status—"must be altered when," as was assertedly the case there, "they are *** part of the merits judgment" under "the *** law authorizing them." *Budinich*, 486 U.S. at 201. And this Court expressly *rejected* that argument, holding that "consistency and predictability" is more important than whether a particular award is properly characterized as "'merits' or 'nonmerits.'" *Id.* at 202.

Respondents also contend that treating contractual attorney's fees as "collateral" when the claim for fees was "stated in the complaint and sought as damages" would "increase the frequency of piecemeal appeals, thereby frustrating rather than promoting the purposes of § 1291." Opp. 35. *Budinich* rejected that argument too. "[A]n appeal of merits-without-attorney's-fees when *** the attorney's fees [are deemed] part of the merits," the Court explained, "is no more harmful *** than an appeal of merits-without-attorney's-fees when [they are not]." *Budinich*, 486 U.S. at 202. The former is not "more disruptive of ongoing proceedings, more likely to eliminate a trial judge's opportunity for reconsideration, more susceptible to being mooted by settlement, or in any way (except nominally) a more piecemeal enterprise." *Ibid.*

Respondents are not helped by *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), which held that a motion for prejudgment interest is a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). See Opp. 29. *Osterneck* distinguished *Budinich* on the ground that, unlike attorney's fees, which "as a general matter" are "not part of the compensation for the plaintiff's injury," prejudgment interest "traditionally has been considered part of the compensation due plaintiff." 489 U.S. at 175. The rules adopted in the cases thus were different because the general nature of attorney's fees and prejudgment interest are different. *Osterneck* does not support the theory that either rule should give way if the traditional understanding of the relief does not apply in a particular case.

Finally, respondents' repeated insistence (Opp. 11, 13, 18-21, 25) that *Budinich*'s rule is limited to

fees "for the litigation at hand," *Budinich*, 486 U.S. at 201, is curious, inasmuch as the bulk of the fees *here* indisputably were for the litigation at hand. See Pet. 23.

2. Respondents also advance a complicated theory that the First Circuit itself did not adopt. The theory relies upon two Federal Rules of Civil Procedure: Rule 54(d)(2)(A), which provides that "[a] claim for attorney's fees *** must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages," and Rule 58(e), which provides that, "if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may *** order that the motion have the same effect *** as a timely motion under Rule 59"—*i.e.*, that it delay the time for filing a notice of appeal until the motion is disposed of, see Fed. R. App. P. 4(a)(4). The Rules give district courts discretion, in an appropriate case, "to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits." Fed. R. Civ. P. 58 advisory committee's note (1993).

The premise of respondents' theory seems to be that, because Rule 58 refers to a "motion for attorney's fees *** under Rule 54(d)(2)," and because Rule 54(d)(2) does not require a motion when the fees are an "element of damages," Rule 58 does not grant discretion to extend the time for an appeal when there is a pending request for fees that are an element of damages. Opp. 34 From that premise, respondents draw two conclusions: that there was "no need to address" such fees in Rule 58 because *Budinich* does not apply to them; and that, if *Budinich* did apply to them, they would be in "a procedural no-man's-

land"—covered by "*Budinich*'s finality rule" but not by Rule 58's solution to "the problem of piecemeal appeals." *Ibid.* Respondents' premise is erroneous, and thus so too are their conclusions.

It is simply not true that, by virtue of its reference to Rule 54(d)(2), Rule 58 "does not address fees that constitute 'an element of damages.'" Opp. 34. Respondents apparently read Rule 54(d)(2) to say that fees that are an element of damages may not be sought by motion. But it does not say that. It says only that they do not *have to be* sought by motion—presumably because fees that are truly an "element of damages" to be "proved at trial" will often if not ordinarily be awarded at the same time as other damages. If they are not, however, nothing in the Rules prevents a party from filing a motion (together with a request for an order, if desired, that delays the time for appeal).

Far from being prohibited, a motion will often be necessary, because even fees that are supposedly part of the "merits" may consist mainly of fees for litigating the case (as they did here), thus requiring the party seeking fees to provide the district court with new information. Tellingly, respondents did just that, "fil[ing] a motion for attorneys' fees" post-trial. Pet. App. 3a; see Dist. Ct. Dkt. 69. There was thus nothing to prevent the district court from extending the time to appeal *in this very case*.

C. The Question Presented Is Important

As the petition explains (at 25-28), the question presented is a recurring and important one because tens of thousands of contract cases are filed in federal court each year, a substantial proportion of contracts include attorney's fees provisions, and the

finality issue can arise in a variety of procedural settings. Respondents do not dispute any of this. Instead they claim that (1) there is no need for "nationwide uniformity," because "there is no prospect of forum shopping," and (2) if there is a need for uniformity, "this Court should achieve it not in its adjudicative capacity by granting certiorari, but in its rulemaking capacity *** by amending the Federal Rules." Opp. 36. These points would have been equally applicable in *Budinich*, and yet the Court granted certiorari to decide a similar question there. In any event, neither argument provides a basis for denying certiorari here.

As to the first, the main problem is not forum shopping but the lack of certainty within forums. *Budinich* itself makes clear that "what is of importance" is "predictability" in applying Section 1291 and that the time for appeal be "clear." 486 U.S. at 202. In circuits, like the First, in which contractual fee awards may or may not be deemed collateral, it is difficult to know in advance how the circuit's rule will be applied in a particular case—or even what the rule *is*. See Pet. 22-24. It is manifestly incorrect, therefore, that "[o]nce a circuit lays down its rule, litigants within that circuit can predict the finality and appealability of attorney's fee awards." Opp. 35-36.

The Court should also reject respondents' invitation to resolve the conflict through rulemaking. Although it is true that this Court has "recognized *** that the possibility of amending rules may obviate the need for a grant of certiorari," it is also true, as respondents concede, that that recognition arose "in a different context"—that of the Sentencing Guidelines. Opp. 36. In that unique context, there was evidence that "Congress intended [the] Sentencing

Commission to play [the] primary role in resolving conflicts over interpretation of Guidelines." *Buford* v. *United States*, 532 U.S. 59, 66 (2001). With respect to "eliminat[ing] a conflict concerning a statutory provision" like 28 U.S.C. § 1291, in contrast, the task is "[o]rdinarily" and "primarily" this Court's, through the exercise of its "certiorari jurisdiction." *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991). Certiorari is particularly appropriate in a case, like this, involving the proper interpretation of one of this Court's precedents.

D. This Case Is An Ideal Vehicle

As the petition explains (at 28-30), this case is an especially good vehicle for deciding the question presented because the answer will be outcome-determinative on *all* the issues in respondents' appeal. Respondents do not contend otherwise. Instead they repeat their argument that there is no circuit conflict on whether the type of fee award at issue here is collateral. Opp. 38. We have already explained why that is wrong. Respondents' appeal of the district court's merits decision would have been dismissed as untimely in four other circuits, and this Court should grant certiorari to decide whether the rule applied in those circuits is correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2013

JOINT APPENDIX

No. 12-992

In the Supreme Court of the United States

RAY HALUCH GRAVEL CO., ET AL.,

Petitioners,

v.

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 8, 2013
CERTIORARI GRANTED JUNE 17, 2013

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United States District Court
District of Massachusetts (Springfield)
Case #: 3:09-cv-11607-TSH

International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds et al
v.
Ray Haluch Gravel Co. et al

Date Filed	#	Docket Text
09/25/2009	1	COMPLAINT against all defendants Filing fee: $ 350, receipt number 0101000000002598680, filed by International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, Local 98 Engineers Joint Taining, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98, AFL-CIO,. (Attachments: # 1 Civil Cover Sheet)(Blitman, Charles) Modified on 9/25/2009 to limit access to attachment to court users only. Document filed in form-fillable format.(Cummings, Mary). (Additional attachment(s) added on 10/1/2009: # 2 civil cover (non-fillable)) (Duong, Diep). (Additional attachment(s) added on 8/7/2012: # 3 Category Sheet) (Lindsay,

Date Filed	#	Docket Text
		Maurice). (Entered: 09/25/2009)
09/25/2009		ELECTRONIC NOTICE of Case Assignment. Judge Nathaniel M. Gorton assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Marianne B. Bowler (Cummings, Mary) (Entered: 09/25/2009)
		****
10/27/2009	11	Case transferred to Springfield. Case was filed in wrong division. (Duong, Diep) (Entered: 10/27/2009)
10/28/2009		Case transferred in from Boston Division on 10/27/2009 Case Number 1:09-cv-11607. Case assigned to Judge Michael A Ponsor. (Stuckenbruck, John) (Entered: 10/28/2009)
10/29/2009	12	ANSWER to 1 Complaint,,, by Ray Haluch, Inc. (Cahillane, Maurice) (Additional attachment(s) added on 11/2/2009: # 1 Answer, # 2 Certificates of Service) (Lindsay, Maurice). (Entered: 10/29/2009)
10/29/2009	13	ANSWER to 1 Complaint,,, by Raymond Haluch.(Cahillane, Maurice) (Additional attachment(s) added on 11/2/2009: # 1 Answer, # 2 Certificate of Service) (Lindsay, Maurice). Modified on 11/2/2009 to change doc# from 14 to 13 (Lindsay, Maurice). (Entered: 10/29/2009)
		****

Date Filed	#	Docket Text
03/02/2011	55	Transcript of Non-Jury Trial Volume 3 held on February 28, 2011, before Judge Michael A. Ponsor. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Alice Moran at 413-731-0086 Redaction Request due 3/23/2011. Redacted Transcript Deadline set for 4/4/2011. Release of Transcript Restriction set for 5/31/2011. (Scalfani, Deborah) (Entered: 03/02/2011)
		* * * *
03/04/2011	57	Transcript of Non-Jury Trial held on February 22, 2011, before Judge Michael A. Ponsor. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Sarah Mubarak atsarahmubarek@comcast.net Redaction Request due 3/25/2011. Redacted Transcript Deadline set for 4/4/2011. Release of Transcript Restriction set for 6/2/2011. (Scalfani, Deborah) Modified on 3/4/2011 (Scalfani, Deborah). (Entered: 03/04/2011)
03/04/2011	58	Transcript of Non-Jury Trial held on February 23, 2011, before Judge Michael A. Ponsor. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Sarah

Date Filed	#	Docket Text
		Mubarak atsarahmubarek@comcast.net Redaction Request due 3/25/2011. Redacted Transcript Deadline set for 4/4/2011. Release of Transcript Restriction set for 6/2/2011. (Scalfani, Deborah) Modified on 3/4/2011 (Scalfani, Deborah). (Entered: 03/04/2011)
		* * * *
04/04/2011	69	MOTION for Attorney Fees by Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO, Local 98 Engineers Joint Taining, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund. (Attachments: # 1 Exhibit A to Wagner Affidavit, # 2 Exhibit B to Wagner Affidavit, # 3 Exhibit C to Wagner Affidavit)(Wagner, Kenneth) (Main Document 69 replaced on 4/6/2011) (Lindsay, Maurice). (Additional attachment(s) added on 4/6/2011: # 4 Affidavit of Kenneth Wagner) (Lindsay, Maurice). (Entered: 04/04/2011)
		* * * *
04/15/2011	70	Opposition re 69 MOTION for Attorney Fees filed by Ray Haluch Gravel Co.. (Cahillane, Maurice) (Entered:

Date Filed	#	Docket Text
		04/15/2011)
04/15/2011	71	AFFIDAVIT in Opposition re 69 MOTION for Attorney Fees filed by Ray Haluch Gravel Co.. (Cahillane, Maurice) (Entered: 04/15/2011)
06/17/2011	72	Judge Michael A. Ponsor: MEMORANDUM ANDORDER entered denying the Deft's 51 Motion Motion to Enforce the Settlement. The Court hereby finds for Pltfs. in the total amount of $26,897.41. The Clerk will enter judgment for the Pltfs. in this amount. The court will rule on Pltfs' motion for attorneys' fees - 69 in a separate memorandum to follow. (Finn, Mary) (Entered: 06/17/2011)
06/17/2011	73	Judge Michael A. Ponsor: ORDER entered. JUDGMENT entered for the Pltfs' pursuant to the Memorandum and Order of the Court entered this date denying the Deft's motion to enforce settlement and finding for the Pltfs' in the total amount of $26,897.41.(Finn, Mary) (Entered: 06/17/2011)
06/17/2011		Civil Case Terminated. (Finn, Mary) (Entered: 06/17/2011)
07/25/2011	74	Judge Michael A. Ponsor: MEMORANDUM AND ORDER entered. As follows: Plaintiffs Motion for Attorneys Fees (Dkt. No. 69) is hereby ALLOWED IN PART. The court hereby awards Plaintiffs attorneys fees and costs in the total amount of $34,688.15. This case may now be closed. It is So Ordered. See the attached memo

Date Filed	#	Docket Text
		and order for the complete details. (Lindsay, Maurice) (Entered: 07/25/2011)
08/15/2011	75	NOTICE OF APPEAL by Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO,, Local 98 Engineers Joint Taining, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund Filing fee: $ 455, receipt number 0101-3541992 Fee Status: Not Exempt. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/efiling.htm. US District Court Clerk to deliver official record to Court of Appeals by 9/6/2011. (Wagner, Kenneth) (Entered: 08/15/2011)

* * * *

Date Filed	#	Docket Text
08/17/2011		USCA Case Number 11-1944 for 75 Notice of Appeal, filed by International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, Local 98 Engineers Joint Taining, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO,, Central Pension Fund of the International Union of Operating Engineers and Participating Employers. (Ramos, Jeanette) (Entered: 08/17/2011)
08/22/2011	77	*Defendant's* NOTICE OF APPEAL as to 74 Order on Motion for Attorney Fees, 72 Order on Motion for Miscellaneous Relief, by Ray Haluch Gravel Company, Inc. Filing fee: $ 455, receipt number 0101-3550988 Fee Status: Not Exempt. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/efiling.htm. US District Court Clerk

Date Filed	#	Docket Text
		to deliver official record to Court of Appeals by 9/12/2011. (Cahillane, Maurice) (Entered: 08/22/2011)

* * * *

United States Court of Appeals
for the First Circuit

Docket #: 11-1944

International Union, et al
v.
Ray Haluch Gravel Inc., et al

Appeal From: District Court of MA, Springfield

10/03/2011 ORDER directing the parties to proceed under F.R.A.P 28.1; directing parties to show cause why the appeal should include an appeal from the district court's memorandum and order (#72) and judgment (#73) that entered on June 17, 2011. Show response due 10/17/2011. [11-1944, 11-1970] (GK)

* * * *

10/17/2011 RESPONSE filed by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, Inter-

national Union of Operating Engineers Local 98 and Employers Cooperative Trust and International Union of Operating Engineers Local 98, AFL-CIO in 11-1970 to designating cases as xap's [5584584-2], general show cause [5584584-3], order [5584584-4], to extend time to file response [5584584-5]. Certificate of service dated 10/17/2011. [11-1944, 11-1970] (KLW)

01/24/2012 ORDER entered by Michael Boudin, Appellate Judge. Having considered the response to the show cause order, we direct that a briefing schedule be set and invite the parties to address any question of timeliness in their briefs along with the merits. See generally Carolina Power & Light Co. v. Dynegy Marketing & Trade, 415 F.3d 354 (4th Cir. 2005)(discussing import of resolution of contractual attorneys' fees provision to finality of judgment). So ordered. [11-1944, 11-1970] (GK)

* * * *

03/05/2012 BRIEF tendered by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. Certificate of service dated 03/05/2012. [11-1944, 11-1970] (KLW)

03/06/2012 APPELLANT'S BRIEF filed by Appellants/Cross-Appellees Central Pension Fund of the Interna-

tional Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. Certificate of service dated 03/05/2012. Brief due 04/09/2012 for appellee Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc.. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 03/13/2012. [11-1944, 11-1970] (RL)

03/07/2012 PLEADING tendered: (3) Copies of Appellants/Cross-Appellees Joint Appendix [USPS package 1 of "2" received] filed by in 11-1944, 11-1970. Certificate of service dated 03/05/2012. [11-1944, 11-1970] (RL)

03/07/2012 JOINT APPENDIX filed by Appellants/Cross-Appellees. Number of volumes: 1. Number of copies: 5. Certificate of service dated 03/05/2012. [11-1944, 11-1970] (RL)

03/09/2012 NINE (9) paper copies of appellant/petitioner brief [5623536-2] submitted by Appellants/Cross-Appellees in 11-1944, 11-1970. [11-1944, 11-1970] (RL)

* * * *

04/12/2012 BRIEF tendered by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and

Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 04/12/2012. [11-1944, 11-1970] (JAA)

04/12/2012 APPELLEE'S BRIEF filed by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 04/12/2012. Reply brief due 05/17/2012 for appellant Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 04/19/2012. [11-1944, 11-1970] (BLC)

04/12/2012 CORPORATE disclosure statement filed by Appellees/Cross-Appellants Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 04/12/2012. [11-1944, 11-1970] (BLC)

04/18/2012 NINE (9) paper copies of appellee/respondent brief [5633216-2] submitted by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co. and Ray Haluch, Inc. in 11-1944. [11-1944, 11-1970]. CLERK'S NOTE: Docket entry was edited to modify the docket text.

(RL)

05/17/2012 BRIEF tendered by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. Certificate of service dated 05/17/2012. [11-1944, 11-1970] (KLW)

05/18/2012 REPLY BRIEF filed by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. Certificate of service dated 05/17/2012. Reply brief due 06/04/2012 for Appellees/Cross-Appellants Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc.. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 05/25/2012. [11-1944, 11-1970] (RL)

05/22/2012 NINE (9) paper copies of reply brief [5642202-2] submitted by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. [11-1944, 11-1970] (CC)

06/04/2012 BRIEF tendered by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 06/04/2012. [11-1944, 11-1970] (JAA)

06/05/2012 REPLY BRIEF filed by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 06/04/2012. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 06/12/2012. [11-1944, 11-1970] (RL)

06/12/2012 NINE (9) paper copies of reply brief [5646277-2] submitted by Appellant/Cross-Appellee Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund and Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and

Ray Haluch, Inc. in 11-1944, Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co. and Ray Haluch Gravel Company, Inc. in 11-1970. [11-1944, 11-1970] (CC)

* * * *

07/31/2012 CASE argued. Panel: Rogeriee Thompson, Appellate Judge; Bruce M. Selya, Appellate Judge and Timothy Belcher Dyk, Appellate Judge. Arguing attorneys: Kenneth L. Wagner for International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, Central Pension Fund of the International Union of Operating Engineers and Participating Employers and International Union of Operating Engineers Local 98, AFL-CIO and Jose Antonio Aguiar for Ray Haluch Gravel Co.11-1944, 11-1970. [11-1944, 11-1970] (LM)

* * * *

09/12/2012 OPINION issued by Rogeriee Thompson, Appellate Judge; Bruce M. Selya, Appellate Judge and Timothy Belcher Dyk, Appellate Judge. Published [11-1944] (GK)

09/12/2012 JUDGMENT entered by Rogeriee Thompson, Appellate Judge; Bruce M. Selya, Appellate Judge and Timothy Belcher Dyk, Appellate Judge. Remanded. [11-1944] (GK)

10/04/2012 MANDATE issued. [11-1944, 11-1970] (GK)

* * * *

United States Court of Appeals
for the First Circuit

Docket #: 11-1970

International Union, et al
v.
Ray Haluch Gravel Inc., et al

Appeal From: District Court of MA, Springfield

* * * *

10/03/2011 ORDER directing the parties to proceed under F.R.A.P 28.1; directing parties to show cause why the appeal should include an appeal from the district court's memorandum and order (#72) and judgment (#73) that entered on June 17, 2011. Show response due 10/17/2011. [11-1944, 11-1970] (GK)

* * * *

10/17/2011 RESPONSE filed by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, Internation-

al Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust and International Union of Operating Engineers Local 98, AFL-CIO in 11-1970 to designating cases as xap's [5584584-2], general show cause [5584584-3], order [5584584-4], to extend time to file response [5584584-5]. Certificate of service dated 10/17/2011. [11-1944, 11-1970] (KLW)

01/24/2012 ORDER entered by Michael Boudin, Appellate Judge. Having considered the response to the show cause order, we direct that a briefing schedule be set and invite the parties to address any question of timeliness in their briefs along with the merits. See generally Carolina Power & Light Co. v. Dynegy Marketing & Trade, 415 F.3d 354 (4th Cir. 2005)(discussing import of resolution of contractual attorneys' fees provision to finality of judgment). So ordered. [11-1944, 11-1970] (GK)

* * * *

03/05/2012 BRIEF tendered by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. Certificate of service dated 03/05/2012. [11-1944, 11-1970] (KLW)

03/06/2012 APPELLANT'S BRIEF filed by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. Certificate of service dated 03/05/2012. Brief due 04/09/2012 for appellee Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 03/13/2012. [11-1944, 11-1970] (RL)

03/07/2012 PLEADING tendered: (3) Copies of Appellants/Cross-Appellees Joint Appendix [USPS package 1 of "2" received] filed by in 11-1944, 11-1970. Certificate of service dated 03/05/2012. [11-1944, 11-1970] (RL)

03/07/2012 JOINT APPENDIX filed by Appellants/Cross-Appellees. Number of volumes: 1. Number of copies: 5. Certificate of service dated 03/05/2012. [11-1944, 11-1970] (RL)

03/09/2012 NINE (9) paper copies of appellant/petitioner brief [5623536-2] submitted by Appellants/Cross-Appellees in 11-1944, 11-1970. [11-1944, 11-1970] (RL)

* * * *

04/12/2012 BRIEF tendered by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 04/12/2012. [11-1944, 11-1970] (JAA)

04/12/2012 APPELLEE'S BRIEF filed by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 04/12/2012. Reply brief due 05/17/2012 for appellant Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 04/19/2012. [11-1944, 11-1970] (BLC)

04/12/2012 CORPORATE disclosure statement filed by Appellees/Cross-Appellants Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 04/12/2012. [11-1944, 11-1970] (BLC)

04/18/2012 NINE (9) paper copies of appellee/respondent brief [5633216-2] submitted by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co. and Ray Haluch, Inc. in

11-1944. [11-1944, 11-1970]. CLERK'S NOTE: Docket entry was edited to modify the docket text. (RL)

05/17/2012 BRIEF tendered by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. Certificate of service dated 05/17/2012. [11-1944, 11-1970] (KLW)

05/18/2012 REPLY BRIEF filed by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. Certificate of service dated 05/17/2012. Reply brief due 06/04/2012 for Appellees/Cross-Appellants Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc.. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 05/25/2012. [11-

1944, 11-1970] (RL)

05/22/2012 NINE (9) paper copies of reply brief [5642202-2] submitted by Appellants/Cross-Appellees Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund in 11-1944, 11-1970. [11-1944, 11-1970] (CC)

06/04/2012 BRIEF tendered by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 06/04/2012. [11-1944, 11-1970] (JAA)

06/05/2012 REPLY BRIEF filed by Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, 11-1970. Certificate of service dated 06/04/2012. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 06/12/2012. [11-1944, 11-1970] (RL)

06/12/2012 NINE (9) paper copies of reply brief [5646277-2] submitted by Appellant/Cross-Appellee Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund and Appellees/Cross-Appellants

Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co., Ray Haluch Gravel Company, Inc. and Ray Haluch, Inc. in 11-1944, Appellees/Cross-Appellants Raymond Haluch, Raymond Haluch, Ray Haluch Gravel Co. and Ray Haluch Gravel Company, Inc. in 11-1970. [11-1944, 11-1970] (CC)

* * * *

07/31/2012 CASE argued. Panel: Rogeriee Thompson, Appellate Judge; Bruce M. Selya, Appellate Judge and Timothy Belcher Dyk, Appellate Judge. Arguing attorneys: Kenneth L. Wagner for International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, Central Pension Fund of the International Union of Operating Engineers and Participating Employers and International Union of Operating Engineers Local 98, AFL-CIO and Jose Antonio Aguiar for Ray Haluch Gravel Co.11-1944, 11-1970. [11-1944, 11-1970] (LM)

* * * *

09/12/2012 JUDGMENT entered by Rogeriee Thompson, Appellate Judge; Bruce M. Selya, Appellate Judge and Timothy Belcher Dyk, Appellate Judge. Dismissed without prejudice. [11-1970] (GK)

10/04/2012 MANDATE issued. [11-1944, 11-1970] (GK)

* * * *

THIS AGREEMENT made and entered into by and between RAY HALUCH GRAVEL COMPANY, INC. of 1014 Center Street, Ludlow, Massachusetts, party of the first part, hereinafter called the Employer and the INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 98, 98A, 98B and 98C of East Longmeadow, Massachusetts, party of the second part, hereinafter called the Union.

ARTICLE I

Scope of Employment: The terms of this Agreement shall apply to all work within the jurisdiction of the Operating Engineers, Hoisting and Portable Branch, in connection with all operations usually performed in the sand and gravel industry, described in Article IV, below.

ARTICLE II

Union Security: The Employer recognizes the Union as the bargaining agent for the employees covered by the Agreement for the purpose of collective bargaining. It is further agreed, that it shall be a condition of employment that all such employees be and remain members in good standing of the Union: except that new employees must become and remain members in good standing after thirty (30) days of employment.

It is further agreed, that if the Employer needs additional employees, he will give the Union equal opportunity with other sources to furnish applicants for employment.

ARTICLE III

Hours: The regular work day shall be eight (8) hours, Monday thru Friday. The regular starting time shall be between 7:00 AM and 8:00 AM with one half (1/2) hour lunch period. Any work performed be-

fore starting time and after eight (8) hours on a regular work day shall be at time and one half.

The regular starting time must be established on the first day of the week and will continue for a week or more and can only be changed at the end of a week.

The regular work week shall be forty (40) hours, eight (8) hours each day, Monday through Friday. Time and one half shall be paid for all overtime, except that work performed on Sunday or a Holiday shall be at double time. Saturday shall be time from Friday midnight until Saturday midnight. Sunday shall be from Saturday midnight until Sunday midnight.

Reporting time on Saturday or Sunday shall be two (2) hours at premium pay; and for starting work, no less than four (4) hours at premium pay; and for work beyond the fourth (4th) hour, no less than eight (8) hours at premium pay.

ARTICLE IV

Employees are to be classified as follows:

1. Superintendent of Equipment

2. Master Mechanic

3. Maintenance Mechanic, Operators on shovels, cranes, draglines, bulldozers, plant operators, front end loaders, power leaders of all types and similar equipment.

ARTICLE V

The rate of wages shall be as follows:

Effective Date	05-01-05	05-01-06	05-01-07
Classification:			
1	$14.71	$14.71	$14.71
2	14.61	14.61	14.61
3	14.51	14.51	14.51
Health & Welfare	3.75	4.25	4.75
Pension Fund	1.45	1.65	1.85
Central Pension Fund	.25	.25	.25
Training Fund	.15	.20	.25

ARTICLE VI

1. The Employer agrees to and shall pay and contribute an amount equal to that shown under Article V in this Agreement to the following Funds:

a) International Union of Operating Engineers, Local 98 Health & Welfare Fund, hereinafter referred to as the "Welfare Fund".

b) International Union of Operating Engineers, Local 98 Pension Fund, hereinafter referred to as the "Pension Fund".

c) Central Pension Fund of the International Union of Operating Engineers and Participating Employers, hereinafter referred to as the "Central Pension Fund".

d) International Union of operating Engineers Annuity Fund, hereinafter referred to as the "Annuity Fund".

e) Local 98, Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, hereinafter referred to as the "Training Fund".

2. The respective rates per hour as shown under Article V for the Welfare Fund and the Pension Fund shall be paid for each payroll hour (an overtime hour for this purpose shall be considered a single hour) and proportionately for each part of such an hour for each employee covered by this Agreement, up to a maximum of two thousand eighty (2,080) hours in any one calendar year. Contributions to the Central Pension Fund and the Annuity Fund as shown under Article V, shall be for all payroll hours (an overtime hour for this purpose shall be considered a single hour) and proportionately for each part of such an hour for each employee covered by this Agreement. On or before the tenth (10th) day of each month the said payments shall be due and payable for all such payroll periods ending the next preceding month.

3. Failure by the Employer to make contributions in accordance with Sections 1 and 2 may be treated by the Union as a breach of this working Agreement by the Employer, which may result in immediate work stoppage and the use of picket lines against the Employer. Any costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer.

ARTICLE VII

Upon notification by the Union that a uniform administrative dues deduction has been authorized by the employees of the Employer, the Employer shall deduct said uniform administrative dues. The Union shall be responsible for obtaining all individu-

al signed authorizations. The Union will hold harmless the Employer for any liabilities under said deductions.

ARTICLE VIII

Holidays: Employees shall be entitled to the following holidays:

New Year's Day	Washington's Birthday	Memorial Day
Fourth of July	Labor Day	Columbus Day
Veteran's Day	Thanksgiving Day	Christmas Day

or the days on which these holidays are observed. On these days the employees will receive eight (8) hours pay as holiday pay, regardless of what day the holiday falls on. Double time will be paid for all work performed on such days. Employees on the payroll as of December 1st shall be paid for Christmas Holiday pay.

ARTICLE IX

Vacations: All employees employed by the Employer from one (1) to three (3) years, are to be given one (1) week vacation with pay. Employees with four (4) years to nine (9) years are to be given two (2) weeks vacation with pay. Employees with ten (10) years to nineteen (19) years are to be given three (3) weeks vacation with pay. Employees with twenty (20) years and over are to be given four (4) weeks vacation with pay. An Employee must work a total of twelve hundred (1,200) hours to be given credit for a year for a year's credit in any one year.

Employee's entitled to two, three or four weeks vacation may select one week at the employee's option by making mutual arrangements with the Employer and the particular employee as to the time of vacation.

ARTICLE X

The Business Agent will be allowed to visit the yards of the Employer at all reasonable times to see that the terms of this Agreement are being complied with.

ARTICLE XI

No employee of the Employer shall take the place of an employee who has been discharged through no fault of his own, pending an investigation by the Union or it authorized Agent. Provided such employee who has been discharged makes a complaint to the Union or Agent of the Union within twenty four (24) hours of his discharge, then he is to be returned to his job and the Employer will have to pay for his lost time, providing it does not exceed one weeks pay. Failure to adjust any case under this Article, it will be referred to the following Article for grievance procedure.

ARTICLE XII

There shall be a Committee of two (2), one from the Employer and one from the Union to serve as a Grievance Committee in any case of trouble arising on the job. The same to be referred to them for settlement. If they fail to agree, they are to appoint a third party to hear both sides, whose decision shall be final and binding on both parties.

ARTICLE XIII

The provisions of this Agreement shall be binding upon the company and its successors, assigns or transferees by sale, merger consolidations or otherwise.

The terms of this Agreement shall become effective May 1, 2005 and shall continue in effect until April 30, 2008.

This Agreement shall continue to be effective from year to year unless either party on or before January 1, 2008, or prior to January 1 in any year thereafter gives notice in writing to the other party of its intention to terminate, alter or amend this Agreement.

It is further agreed that the parties shall meet before January 1, 2008 to negotiate wage rates and/or fringe benefit rates. It is further agreed that any other terms and conditions of employment shall not be subject to direct or indirect negotiation for the full duration of the Agreement, except by mutual agreement of the parties.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their duly authorized representatives this 18 day of ~~July,~~ June, 2005.

[illegible]

FOR THE EMPLOYER	FOR THE UNION
/s/ [illegible]	/s/ [illegible] Business Manager/President
	/s/ [illegible] Recording-Corresponding Secretary

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 HEALTH AND WELFARE, PENSION AND ANNUITY FUNDS, by Barbara Lane, as Administrative Manager; LOCAL 98 ENGINEERS JOINT TRAINING, RETRAINING, SKILL IMPROVEMENT, SAFETY EDUCATION, APPRENTICESHIP AND TRAINING FUND, by Barbara Lane, as Administrative Manager; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 AND EMPLOYERS COOPERATIVE TRUST, by William Sullivan and Eugene P. Melville, Jr., as Trustees; CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, by Michael R. Fanning, as Chief Executive Officer; and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager,

Plaintiffs,

v.

RAY HALUCH GRAVEL CO.; RAY HALUCH, INC.; RAY HALUCH, INC. d/b/a RAY HALUCH GRAVEL CO.; RAY HALUCH GRAVEL COMPANY, INC.; RAY HALUCH GRAVEL COMPANY, INC. d/b/a RAY HALUCH GRAVEL CO.; RAYMOND HALUCH, Individually and as an Officer of RAY HALUCH, INC. and RAY HALUCH GRAVEL COMPANY, INC.; and RAYMOND HALUCH, Individually and d/b/a RAY HALUCH GRAVEL CO.,

Defendants.

Civil Action No.:

COMPLAINT

Plaintiffs, by their undersigned attorneys, Blitman & King, LLP, complaining of the Defendants, respectfully allege as follows:

I. JURISDICTION AND VENUE

1. This is an action arising under the Employee Retirement Income Security Act of 1974 [hereinafter the "Act"] [29 U.S.C. §§ 1001 *et seq.*]. It is an action by employee benefit plans for monetary and injunctive relief to redress violations of Section 515 of the Act [29 U.S.C. § 1145]. It is also an action under Section 502(a)(2) and (3) for breach of fiduciary duty against the individual responsible for failing to timely remit contributions and otherwise abide by the documents that establish and maintain an ERISA covered plan [29 U.S.C. §1132(a)(2)and (3)].

2. Jurisdiction is conferred on this Court by § 502 of the Act [29 U.S.C. § 1132], without respect to the amount in controversy or the citizenship of the parties, as provided in § 502(f) of the Act [29 U.S.C. § 1132(f)].

3. Venue is established in this Court by § 502(e)(2) of the Act [29 U.S.C. § 1132(e)(2)]. It is an action brought in the district where some of the plans are administered.

4. This is also an action arising under Section 301(a) of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 185(a)]. It is a suit for, among other things, violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in the Labor-Management Relations Act of 1947, as amended [29 U.S.C. §§ 141 *et seq.*].

5. Jurisdiction is also conferred on this Court, without respect to the amount in controversy, pursuant to Section 301 of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 185(a)], and pursuant to 28 U.S.C. § 1337.

II. DESCRIPTION OF THE PARTIES

6. Plaintiff Barbara Lane is the Administrative Manager of the International Union of Operating Engineers Local 98 Annuity Fund ["Annuity Fund"], International Union of Operating Engineers Local 98 Pension Fund ["Pension Fund"], International Union of Operating Engineers Local 98 Health and Welfare Fund ["Health and Welfare Fund"], Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund ["Local 98 Apprenticeship and Training Fund"] [hereinafter the Annuity Fund, Pension Fund, Health and Welfare Fund, and the Local 98 Apprenticeship and Training Fund are referred to as "IUOE Local 98 Funds"]. Ms. Lane is a fiduciary of the IUOE Local 98 Funds, as defined in Section 3(21)(A) of ERISA [29 U.S.C. §1002(21)(A)]. The IUOE Local 98 Funds are administered at Two Center Square, P.O. Box 217, East Longmeadow, Massachusetts 01028.

7. Plaintiffs William Sullivan and Eugene P. Melville, Jr. are Trustees of the International Union of Operating Engineers Local 98 and Employers Cooperative Trust ["Cooperative Trust Fund" or "ECT"]. Mr. Sullivan and Mr. Melville, Jr. are fiduciaries of the Cooperative Trust Fund, as defined in Section 3(21)(A) of ERISA [29 U.S.C. §1002(21)(A)]. The ECT is administered at Two Center Square, P.O. Box 217, East Longmeadow, Massachusetts 01028.

8. Plaintiff Michael R. Fanning is the Chief Executive Officer of the Central Pension Fund of the International Union of Operating Engineers and Participating Employers [hereinafter "Central Pension Fund"]. Mr. Fanning is a fiduciary of the Central Pension Fund, as defined in Section 3(21)(A) of ERISA [29 U.S.C. §1002(21)(A)]. The Central Pension Fund maintains an office and principal place of business at 4115 Chesapeake Street, N.W., Washington, D.C. 20016.

9. The IUOE Local 98 Funds and the Central Pension Fund [hereinafter collectively referred to as "Funds" or "Plans"], established pursuant to collective bargaining agreements, are multi-employer plans, as defined in §3(37) of the Act [29 U.S.C. §1002(37)], and are employee benefit plans, as defined in §3(3) of the Act [29 U.S.C. §1002(3)].

10. Plaintiff Eugene P. Melville, Jr. is the Business Manager of the International Union of Operating Engineers Local 98, AFL-CIO [hereinafter "Union"]. The Union is an unincorporated association maintaining its principal offices at Two Center Square, P.O. Box 217, East Longmeadow, Massachusetts 01028 and is a labor organization in an industry affecting commerce, within the meaning of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 141, *et seq.*].

11. Upon information and belief, Defendant Ray Haluch Gravel Co. is a company doing business in the State of Massachusetts, with a principal place of business and offices located at 1014 Center Street, Ludlow, Massachusetts 01056.

12. Upon information and belief, Defendant Ray Haluch, Inc. is a corporation incorporated under the

laws of the State of Massachusetts, having its principal place of business and offices located at 1014 Center Street, Ludlow, Massachusetts 01056, and, at all times relevant herein, was doing business in Massachusetts and was also conducting and transacting business as Ray Haluch Gravel Co.

13. Upon information and belief, Defendant Ray Haluch Gravel Company, Inc. is a corporation having its principal place of business and offices located at 1014 Center Street, Ludlow, Massachusetts 01056, and at all times relevant herein, was doing business in Massachusetts and was also conducting and transacting business as Ray Haluch Gravel Co.

14. Upon information and belief, Defendant Raymond Haluch ["Defendant Officer"] is a resident of the State of Massachusetts, with a last known address of 1034 Center Street, Ludlow, Massachusetts 01056 and, at all times relevant herein, was an officer and a shareholder of the Defendant Ray Haluch, Inc. and Defendant Ray Haluch Gravel Company, Inc. and was also conducting and transacting business as a sole proprietor doing business as Ray Haluch Gravel Co.

15. The Defendants are employers in an industry affecting commerce, all as defined in § 3(5)(11) and (12) of the Act [29 U.S.C. § 1002(5)(11) and (12)]. The Defendants are also employers of employees covered by employee benefit plans and multiemployer plans maintained pursuant to collective bargaining agreements, all as defined in § 3(3) and (37) of the Act [29 U.S.C. § 1002(3) and (37)] and are obligated to make contributions to the Funds in accordance with § 515 of the Act [29 U.S.C. § 1145].

16. To the extent that Defendants exercised any authority or control with respect to the management or disposition of assets of Plaintiff Funds, they are fiduciaries within the meaning of ERISA Section 3(21)(A) [29 U.S.C. §1002(21)(A)].

17. Defendants are parties in interest with respect to the Funds as defined in § 3(14)(H) of the Act [29 U.S.C. § 1002(14)(H)] and act directly as employers and/or indirectly in the interests of the employer in relation to the Plans, all as defined in § 3(5) of the Act [29 U.S.C. § 1002(5)].

III. FIRST CAUSE OF ACTION

18. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "17" inclusive of this Complaint as if set forth fully at this point.

19. Section 515 of the Act [29 U.S.C. § 1145] provides that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

20. At all times relevant herein, Defendant Ray Haluch Gravel Company, Inc., Defendant Ray Haluch Gravel Company and/or Raymond Haluch d/b/a Ray Haluch Gravel Co. (collectively referred to as "Defendant Ray Haluch Gravel") were signatory to a collective bargaining agreement with the International Union of Operating Engineers Local 98, AFL-CIO [hereinafter "Agreement"].

21. Pursuant to the Agreement, Defendant Ray Haluch Gravel is bound by the terms and conditions, rules and regulations of the Agreement and Declaration of Trust of the International Union of Operating Engineers Local 98 Annuity Fund, the Restated Agreement and Declaration of Trust of the International Union of Operating Engineers Local 98 Pension Fund, the Restated Agreement and Declaration of Trust of the International Union of Operating Engineers Local 98 Health and Welfare Fund, the Restated Agreement and Declaration of Trust of the Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, the Restated Agreement and Declaration of Trust of the International Union of Operating Engineers Local No. 98 and Employers Cooperative Trust, the Restated Agreement and Declaration of Trust of the Central Pension Fund of the International Union of Operating Engineers and Participating Employers, and the International Union of Operating Engineers Local 98 Pension, Annuity, Health and Welfare and Training Funds' Collections Policy [hereinafter "Trusts" and "Collections Policy"].

22. The Agreement, Trusts, and the Collections Policy obligate Defendant Ray Haluch Gravel to remit contributions and/or deductions to the Plaintiffs.

23. The Agreement requires Defendant Ray Haluch Gravel to pay the contributions and deductions to the Plaintiffs for each hour each of its employees worked and to remit those monies by the tenth (10^{th}) day of the month following the month during which the hours were worked by employees.

24. Under the Agreement, the Trusts, the Collections Policy, and/or 29 U.S.C. § 1132(g)(2), in the event Defendant Ray Haluch Gravel fails to timely

remit contributions and deductions, it is liable not only for the amount of contributions and deductions due, but also for the following: (1) interest on the unpaid and untimely paid IUOE Local 98 Funds contributions, calculated at the rate of one and one-half percent (1-1/2%) per month; (2) the greater of interest on the unpaid and untimely paid IUOE Local 98 Funds contributions, or liquidated damages equal to twenty percent (20%) of those delinquent contributions; (3) interest on the unpaid and untimely paid Central Pension Fund contributions, calculated at the rate of nine percent (9%) of those delinquent contributions; (4) the greater of interest on the unpaid and untimely paid Central Pension Fund contributions, or liquidated damages equal to fifteen percent (15%) of those delinquent contributions; (5) interest on the unpaid dues deductions, calculated at the rate of twelve percent (12%) per annum; and (6) costs and fees of collection, audit fees, and attorneys' and paralegal fees.

25. The Defendant Ray Haluch Gravel owes $21,025.42 in fringe benefit contributions and deductions, representing $18,375.02 in IUOE Local 98 Funds contributions, $831.78 in Central Pension Fund contributions, and $1,818.62 in Union dues deductions, with regard to the hours worked by employees covered by the Agreements during the period February 2005 through November 2008.

26. Defendant Ray Haluch Gravel has not paid the $21,025.42 in contributions and deductions, plus the applicable interest, liquidated damages, attorneys' fees and costs of collection.

27. The Defendant Ray Haluch Gravel, therefore, owes $21,025.42 in fringe benefit contributions and deductions, plus the following: (1) interest from March 10, 2005 on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, calculated at the rate of one and one-half percent (1-1/2%) per month; (2) the greater of interest on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, or liquidated damages equal to twenty percent (20%) of those delinquent contributions; (3) interest from March 10, 2005 on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, calculated at the rate of nine percent (9%) of those delinquent contributions; (4) the greater of interest on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, or liquidated damages equal to fifteen percent (15%) of those delinquent contributions; (5) interest from March 10, 2005 on the $1,818.62 in unpaid dues deductions, calculated at the rate of twelve percent (12%) per annum; and (6) costs and fees of collection and attorneys' fees.

IV. SECOND CAUSE OF ACTION

28. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "27" inclusive of this Complaint as if set forth fully at this point.

29. The Agreement, the Trusts, the Collections Policy and the Act obligate Defendant Ray Haluch Gravel to permit the Plaintiffs, on demand, to check, examine and audit its books and records, papers and reports as may be necessary to permit the Plaintiffs to determine the amount of contributions due and owing, including, but not limited to, its payroll records, timecards, accounts payable records, general

ledger, cash disbursements journal, hours reports, and any other records relating to hours worked by all employees, including union, non-union, bargaining unit and non-bargaining unit employees, of Defendant Ray Haluch Gravel.

30. Defendant Ray Haluch Gravel is contractually liable under the Agreement, Trusts and Collections Policy to pay the costs and expenses of the audit, all auditing fees, and any and all attorneys' and paralegal fees and costs incurred by the Plaintiffs in obtaining the audit.

31. Defendant Ray Haluch Gravel is contractually liable under the Agreement, Trusts and Collections Policy to timely report on a monthly basis the number of hours worked by all of its employees performing bargaining unit work.

32. Defendant Ray Haluch Gravel failed to produce the required records necessary to complete an audit for the time period January 2005 to March 2009.

33. Defendant Ray Haluch Gravel must be ordered to produce all its books and records for the period January 2005 to date for Plaintiffs' review and audit, to pay the cost and expense of such audit, to pay all auditing fees, and to pay all attorneys' and paralegal fees and costs incurred in obtaining that audit.

34. In the event it is discovered that Defendant Ray Haluch Gravel has not properly submitted accurate reports to the Plaintiffs and has not properly paid the appropriate monies to the Plaintiffs, the Court must enter a judgment for any and all contributions and deductions that are determined to be due, plus the applicable interest thereon, liquidated

damages, costs and expenses of collection, audit fees and attorneys' and paralegal fees, all at the rates set forth in Complaint paragraph no. 24.

V. THIRD CAUSE OF ACTION

35. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "34" inclusive of this Complaint as if set forth fully herein.

36. Upon information and belief, Defendant Ray Haluch Gravel Company, Defendant Ray Haluch, Inc., Defendant Ray Haluch, Inc. d/b/a Ray Haluch Gravel Co., Defendant Ray Haluch Gravel Company, Inc., Defendant Ray Haluch Gravel Company, Inc. d/b/a Ray Haluch Gravel Co. and Raymond Haluch d/b/a Ray Haluch Gravel Co. [hereinafter collectively referred to as "Defendant Companies"] engage in and operate substantially identical businesses and substantially utilize the same officers and personnel.

37. Upon information and belief, the customers serviced and the nature of the businesses conducted by Defendant Companies are substantially identical.

38. Defendant Companies utilize the same tools and equipment and operate from the same physical location and address.

39. Defendant Companies are alter egos of one another and/or a single integrated enterprise or a single employer, and Defendants are mere extensions or continuations of one another.

40. Defendant Companies as alter egos of one another and/or a single integrated enterprise or single employer, are bound to the Agreements, Trusts and Policy described in this Complaint and liable to Plaintiffs for the amounts set forth in paragraph no.

27 of this Complaint, to produce their records for an audit, and to pay amount uncovered by the audit as alleged at paragraph no. 34.

VI. FOURTH CAUSE OF ACTION

41. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "40" of this Complaint as if fully set forth herein.

42. ERISA Section 404(a) provides that fiduciaries must discharge their duties with respect to an ERISA covered plan "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of providing benefits" and "defraying reasonable administrative expenses" [29 U.S.C. §1104(a)(1)(A)].

43. ERISA Section 404(a) provides that fiduciaries must discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments" are consistent with federal law [29 U.S.C. §1104(a)(1)(D)].

44. Effective March 23, 2004, the Agreements and Declarations of Trust for the Health and Welfare Fund, Pension Fund, and Annuity Fund state: "[t]itle to all monies paid into and/or due and owing to [Health and Welfare Fund, Pension Fund, and Annuity Fund is] vested in and remain[s] exclusively in the Trustees of the [Health and Welfare Fund, Pension Fund, and Annuity Fund]; outstanding and withheld contributions constitute Plan assets."

45. The Restated Agreement and Declaration of Trust of the Central Pension Fund, Local 98 Apprenticeship and Training Fund, the Pension Fund, the Annuity Fund, and the Health and Welfare Fund provide that "[t]he Trustees are hereby vested with all right, title and interest in and to such moneys

and all interest which may be accrued thereon, and are authorized to receive and be paid the same."

46. During the period February 2005 through November 2008 and in connection with various projects, Defendants employed individuals covered by the Agreements who performed work on the projects for the benefit of the projects and Defendants.

47. As a result of the labor supplied by covered employees, Defendants, upon information and belief, received sums of money from these projects which were to be used to pay the cost of the labor and satisfy the claims of the Plaintiffs and all of the employees furnishing and supplying the labor.

48. During the period February 2005 through November 2008, Defendants failed to remit the sum of $19,206.80 in fringe benefit contributions with regard to hours worked by employees covered by the Agreements, and Defendants currently owe monies to the Plaintiff Funds.

49. Defendant Officer is a fiduciary of the monies so received and the monies so received and held by him constitute assets of the Plaintiff Plans to be utilized for the benefit of the Plaintiff Plans.

50. By withholding the contributions from the Plaintiff Plans, Defendant Officer has received and retained from the Plaintiff Plans, for Defendants use and benefit, monies which are rightfully assets of the Plaintiff Plans.

51. Defendant Officer, upon information and belief, owned, controlled, and dominated the affairs of Defendant Companies.

52. Upon information and belief, Defendant Officer transferred, applied, used or diverted, or au-

thorized and/or permitted the transfer, application, use, or diversion of, the Plaintiff Funds' trust assets to purposes other than purposes of the Plaintiff Funds without first making payment to Plaintiff Funds.

53. The use of the assets for purposes other than those permitted by the Plaintiff Funds occurred, upon information and belief, with the knowledge and/or at the direction of Defendant Officer.

54. Defendant Officer, upon information and belief, had managerial discretion, control and supervision over the Defendant Companies, made decisions on behalf of the Defendant Companies, signed contracts governing the Defendant Companies, acted on behalf of and in the interest of the Defendant Companies in his dealings and relations with Plaintiff Funds.

55. Defendant Officer, upon information and belief, determined which creditors/bills the Defendant Companies would pay and when to pay those creditors/bills, determined which of the Defendant Companies' creditors would be paid and in what order, determined when the Plaintiff Funds would be paid, determined how much money would be paid to the Plaintiff Funds, exercised authority and control over money due and owing to the Plaintiff Funds and the contributions withheld from the Plaintiff Funds, determined which employees of the Defendant Companies would be reported to the Plaintiff Funds, and determined the number of hours upon which contributions would be reported as owing to the Plaintiff Funds, i.e., the Plaintiff Funds' assets, and, therefore, was a fiduciary.

56. Upon information and belief, Defendant Officer commingled, or authorized and/or permitted the commingling of, assets of the Plaintiff Funds with the Defendant Companies' general assets and used, or authorized and/or permitted the use of, the Plaintiff Funds' assets to pay other creditors of the Defendant Companies rather than forwarding the assets to the Plaintiff Funds.

57. Defendant Officer was a fiduciary with respect to the plan assets he failed to timely pay into the Plaintiff Plans.

58. The use of the Plaintiff Plans' assets for purposes other than the interests of the Plaintiff Plans and their participants and beneficiaries is a violation of §§1104 and 1109 of ERISA.

59. Defendant Officer, acting in his capacity as owner, corporate officer, director and shareholder, abused his position as a fiduciary by permitting, directing or instigating this transfer, application, or diversion in a manner contrary to his fiduciary obligations and his action is a breach of trust under ERISA, 29 U.S.C. §§1104 and 1109.

60. By withholding contributions from the Plaintiff Funds, Defendant Officer failed to act solely in the interests of the participants and beneficiaries and acted contrary to the Plaintiff Funds' documents, and, therefore, is individually and personally liable for the violations of ERISA Section 404 described herein [29 U.S.C. §1104].

61. Defendants, therefore, have damaged Plaintiffs and are liable to Plaintiffs for $19,702.07 in fringe benefit contributions, plus the following:

(A) (1) interest from March 10, 2005 on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, calculated at the rate of one and one-half percent (1-1/2%) per month; (2) the greater of interest on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, or liquidated damages equal to twenty percent (20%) of those delinquent contributions; (3) interest from March 10, 2005 on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, calculated at the rate of nine percent (9%) of those delinquent contributions; (4) the greater of interest on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, or liquidated damages equal to fifteen percent (15%) of those delinquent contributions; plus (5) costs and fees of collection and attorneys' fees.

(B) To restore to the Plans any profits that Defendants made through use and retention of the assets of the Plans.

VII. FIFTH CAUSE OF ACTION

62. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1" through "61" inclusive of this Complaint as if set forth fully at this point.

63. Absent an exemption, ERISA Section 406(a) makes it unlawful for fiduciaries to permit ERISA covered plans to engage in certain transactions with parties in interest, including transactions that ex-

change property or extend credit [29 U.S.C. §1106(a)(1)(A) and (B)]. Absent an exemption, ERISA Section 406(b) makes it unlawful for fiduciaries to deal with plan assets for their personal account [29 U.S.C. §1106(b)(1)-(3)].

64. Section 406 of the Act [29 U.S.C. §1106] provides that the following is illegal:

> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> (B) lending of money or other extension of credit between the plan and a party in interest;
>
> (C) furnishing of goods, services, or facilities between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
>
> (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of Section 1107(a) of this title.

65. At all times relevant herein, Defendant Officer, because he is a fiduciary, employer or owner within the meaning of the Act, is a party in interest with respect to the Plaintiff Funds.

66. Defendants are obligated to remit contributions to the Plaintiff Funds as required by the Agreement, Trusts and Collections Policy.

67. Defendants have failed to pay contributions to the Plaintiff Funds and currently owe contributions to the Plaintiff Funds.

68. By withholding the contributions from the Plaintiff Funds, Defendants dealt with the plan assets in their own interest and/or exchanged property or extended credit from plan assets for their use and benefit in violation of Section 406 of the Act and have received and retained from the Plaintiff Funds for, upon information and belief, their use and benefit, monies which are rightfully assets of the Plaintiff Funds.

69. By withholding, receiving and retaining the contributions, Defendants, as parties in interest, have impermissibly used the assets of the Plaintiff Funds in contravention of §406 of the Act, the interests of the Plaintiff Funds and the interests of the Plaintiff Funds' fiduciaries, participants and beneficiaries.

70. Defendants, therefore, have damaged Plaintiffs and are liable to Plaintiffs for $19,702.07 in fringe benefit contributions, plus the following:

(A) (1) interest from March 10, 2005 on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, calculated at the rate of one and one-half percent (1-1/2%) per month; (2) the greater of interest on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, or liquidated damages equal to twenty percent (20%) of those delinquent contributions; (3) interest from March 10, 2005 on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, calculated at the rate of nine percent (9%) of those delinquent contributions; (4) the greater of interest on the $831.78 in unpaid and untimely paid

Central Pension Fund contributions, or liquidated damages equal to fifteen percent (15%) of those delinquent contributions; plus (5) costs and fees of collection and attorneys' fees.

(B) To restore to the Plans any profits that Defendants made through use and retention of the assets of the Plans.

VIII. SIXTH CAUSE OF ACTION

71. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "70" inclusive of this Complaint, as it fully sets forth at this point.

72. If the Defendants are not enjoined from violating the Act and breaching the terms of the Agreements, the Trusts and the Collections Policy as aforesaid, the Plaintiffs will be further damaged as a result thereof in ways and amounts which cannot be accurately measured in terms of money, either as to extent or amount.

73. The Defendants have continuously failed to comply with their obligations to the Plaintiffs, despite due demand for compliance, and thus, unless the Defendants are enjoined from violating the Act and breaching the terms of the Agreements, the Trusts and the Collections Policy, it is likely that the Defendants will, upon information and belief, continue to fail to timely remit contributions, deductions and monthly remittance reports, causing the Plaintiffs and the beneficiaries of the Funds to incur additional serious and irreparable harm by further burdening and obstructing the administration and operation of the Funds and endangering the payment of promised benefits from the Funds to qualified benefi-

ciaries. A mere money judgment is, thus, an inadequate remedy at law.

74. Because the Defendants have failed to comply with their obligations to the Funds, the corpus of the Funds have been reduced, their income has been reduced, and their abilities to pay benefits are jeopardized, thereby endangering the stability and soundness of the Funds. Again, a money judgment is, thus, an inadequate remedy at law since the Funds will suffer irreparable harm.

75. Because the Defendants have refused to timely remit contributions, deductions and reports to the Plaintiffs, beneficiaries of the Funds may have benefits reduced or terminated that they would otherwise qualify for had the Defendants complied with their obligations, thereby causing these beneficiaries and their families irreparable harm, and thus rendering a money judgment an inadequate remedy at law.

76. Because the Defendants continue to fail to comply with their obligations to the Plaintiffs, new delinquencies are now being created monthly, again depriving the Funds of adequate monies to pay promised benefits which in turn causes the foregoing irreparable harm to be intensified in magnitude.

77. For the foregoing reasons, the Plaintiffs are without an adequate remedy at law and will suffer serious, substantial and irreparable injury and damage unless the Defendants are enjoined from violating the Act and from breaching the terms of the Agreements, the Trusts and the Collections Policy.

78. Unless the Defendants are enjoined by this Court from breaching the terms of the Agreements, the Trust Agreements and the Collections Policy and from violating the Act, and unless the Defendants

are compelled to remit all monies and reports that become due or are determined to be due to Plaintiffs, whether arising before or after commencement of the action, greater injury will be inflicted upon the Plans, their Trustees, participants and beneficiaries, by denial of relief than could possibly be inflicted upon the Defendants by granting such relief.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendants, as follows:

1. On Plaintiffs' First Cause of action, judgment against Defendant Ray Haluch Gravel for $21,025.42 in fringe benefit contributions and deductions, plus the following: (1) interest from March 10, 2005 on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, calculated at the rate of one and one-half percent (1-1/2%) per month; (2) the greater of interest on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, or liquidated damages equal to twenty percent (20%) of those delinquent contributions; (3) interest from March 10, 2005 on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, calculated at the rate of nine percent (9%) of those delinquent contributions; (4) the greater of interest on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, or liquidated damages equal to fifteen percent (15%) of those delinquent contributions; (5) interest from March 10, 2005 on the $1,818.62 in unpaid dues deductions, calculated at the rate of twelve percent (12%) per annum; and (6) costs and fees of collection and attorneys' fees.

2. On Plaintiffs' Second Cause of Action, judgment against the Defendant Ray Haluch Gravel as follows:

(A) Requiring it to produce all its books and records for the period January 2005 to date for Plaintiffs' review and audit, to pay the cost and expense of such audit, to pay all auditing fees, and to pay all attorneys' and paralegal fees and costs incurred in obtaining that audit; and

(B) For any and all contributions and deductions that are determined to be due, plus the applicable interest thereon, liquidated damages, costs and expenses of collection, audit fees and attorneys' and paralegal fees, all at the rates set forth in Complaint paragraph no. 24.

3. On Plaintiffs' Third Cause of Action, judgment against the Defendant Companies as follows:

(A) $21,025.42 in fringe benefit contributions and deductions plus (1) interest from March 10, 2005 on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, calculated at the rate of one and one-half percent (1-1/2%) per month; (2) the greater of interest on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, or liquidated damages equal to twenty percent (20%) of those delinquent contributions; (3) interest from March 10, 2005 on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, calculated at the rate of nine percent (9%)

of those delinquent contributions; (4) the greater of interest on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, or liquidated damages equal to fifteen percent (15%) of those delinquent contributions; (5) interest from March 10, 2005 on the $1,818.62 in unpaid dues deductions, calculated at the rate of twelve percent (12%) per annum; and (6) costs and fees of collection and attorneys' fees;

(B) Requiring them to produce all their books and records for the period January 2005 to date for Plaintiffs' review and audit, to pay the cost and expense of such audit, to pay all auditing fees, and to pay all attorneys' and paralegal fees and costs incurred in obtaining that audit; and

(C) For any and all contributions and deductions that are determined to be due, plus the applicable interest thereon, liquidated damages, costs and expenses of collection, audit fees and attorneys' and paralegal fees, all at the rates set forth in Complaint paragraph no. 24.

4. On Plaintiffs' Fourth Cause of Action, judgment against the Defendant Companies and Defendant Officer for $19,206.80 in fringe benefit contributions, plus the following:

(A) (1) interest from March 10, 2005 on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, calculated at the rate of one and one-half percent (1-1/2%) per month; (2) the great-

er of interest on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, or liquidated damages equal to twenty percent (20%) of those delinquent contributions; (3) interest from March 10, 2005 on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, calculated at the rate of nine percent (9%) of those delinquent contributions; (4) the greater of interest on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, or liquidated damages equal to fifteen percent (15%) of those delinquent contributions; plus (5) costs and fees of collection and attorneys' fees; and

(B) To restore to the Plans any profits that Defendants made through use and retention of the assets of the Plans.

5. On Plaintiffs' Fifth Cause of Action, judgment against the Defendant Companies and Defendant Officer for $19,206.80 in fringe benefit contributions, plus the following:

(A) (1) interest from March 10, 2005 on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, calculated at the rate of one and one-half percent (1-1/2%) per month; (2) the greater of interest on the $18,375.02 in unpaid and untimely paid IUOE Local 98 Funds contributions, or liquidated damages equal to twenty percent (20%) of those delinquent contributions; (3) interest from March 10, 2005 on the $831.78 in unpaid and untimely paid Central Pension Fund

contributions, calculated at the rate of nine percent (9%) of those delinquent contributions; (4) the greater of interest on the $831.78 in unpaid and untimely paid Central Pension Fund contributions, or liquidated damages equal to fifteen percent (15%) of those delinquent contributions; plus (5) costs and fees of collection and attorneys' fees; and

(B) To restore to the Plans any profits that Defendants made through use and retention of the assets of the Plans.

6. On Plaintiffs' Sixth Cause of Action, judgment against the Defendants as follows:

(A) Judgment for any and all additional contributions and deductions that became due or are determined to be due, whether arising before or after commencement of the action, plus the applicable interest, liquidated damages, costs and fees of collection and attorneys' and paralegal fees; plus

(B) A permanent injunction preventing and restraining the Defendants from breaching the Funds' Agreements and Declarations of Trust, the Funds' Collections Policy, and the collective bargaining agreements by which it is bound; plus

(C) A permanent injunction directing the Defendants to perform and continue to perform their obligations to Plaintiffs, specifically, directing them to timely furnish the required monthly remittance reports and payments to Plaintiffs, and to provide

the Plaintiffs, upon demand and at Defendants' expense, access to their books and records for an audit and examination relating to the employment of their employees, including but not limited to weekly payroll reports, payroll journal and quarterly employer reports for various federal and state agencies.

DATED: September 24, 2009

BLITMAN & KING, LLP

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[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN SECTION

INTERNATIONAL UNION
OF OPERATING ENGINEERS

v.

RAY HALUCH GRAVEL CO.

Docket No. 09-11607-MAP

Springfield, MA

February 23, 2011

9:05 a.m.

TRANSCRIPT OF THE TRIAL HELD BEFORE
THE HONORABLE MICHAEL A. PONSOR,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: KENNETH L. WAGNER, ESQUIRE and DANIEL R. BRICE, ESQUIRE, Blitman & King, 443 North Franklin Street, Syracuse, NY 13204.

For the Defendant: MAURICE M. CAHILLANE, JR., ESQUIRE, Egan, Flanagan & Cohen, 67 Market Street, Springfield, MA 01102.

Sarah L. Mubarek
Registered Professional Reporter

[3] * * * *

THE COURT: Please feel free to call your next witness.

MR. WAGNER: We call William Shannon.

The witness, WILLIAM SHANNON, having been duly sworn, testifies as follows:

DIRECT EXAMINATION

Q. (By Mr. Wagner:) Good morning, Mr. Shannon.

A. Morning.

Q. Would you please state your name for the record?

A. William Shannon.

* * * *

[7] * * * *

Q. Thank you. Now, among your clients is the Local 98's trust funds?

A. Yes, it is.

Q. Since when has that set of funds been a client of yours?

A. Since 2006 for payroll audits, compliance [8] audits.

Q. And what is your role in performing payroll compliance audits for the Local 98 funds?

A. My role? I would be in charge of seeing that the audits get scheduled, the audits get completed, get checked properly, sent out, and the status reports are sent up to Local 98 and to prepare those reports for Local 98.

Q. Could you please -- there's been testimony that Local 98, since 2004, has had an audit program. Your firm took over the audit program in 2006?

A. Yes, it did.

Q. Could you please describe sort of generally how you perform an audit, and what the audit process is from the point that you are starting an audit with an employer?

A. From starting an audit?

Q. Including scheduling it.

A. Okay. An audit request would go out to the employer, request letter. We have clerks that work for our firm that would contact the employers to schedule an appointment. An appointment would be scheduled at the employer's place of business, his accountant's, his attorney's, whenever it's best for the employer. Our auditors would go to that place.

[9] We would get the records that we requested. Those records would include the employer's payroll books, the employer's state and federal tax returns, the employer's cash disbursement documents and general ledger, and reports for other unions, other trades, other jurisdictions. When we get those records, they would review the payroll, taking down the hours on anyone they feel is doing bargaining unit work.

THE COURT: Doing what kind of work?

A. Bargaining unit work. They would verify the hours and wages in the payroll to the state and federal taxes to determine completeness of the payroll. They would question anybody in the payroll who may not be doing our work to verify that they in fact were not doing bargaining unit work.

We would look through the cash disbursement records of the employer to determine if there was any subcontracting of bargaining unit work to any non-signatory companies within the jurisdiction, and if there were any payments to any people doing bargaining unit work that would be above what was paid in the payroll for them.

At that point we would leave, go back to the office, finalize the report, and generate a [10] report if there's any deficiency, and that would be sent up to the benefit funds for processing.

* * * *

[11] * * * *

Q. (By Mr. Wagner:) So Mr. Shannon, I think you left off at the point that you finalize the report and send it to the Local 98 funds?

A. Yes.

Q. Now, at that point is your role ended?

A. Unless contacted by the funds or the employer, yes, it is ended.

Q. Let's now turn to the audits that were performed by your firm at the Ray Haluch companies. Could you please tell us what your role was from the beginning with regard to the Haluch companies?

A. Yes. For the Ray Haluch audit, I actually went on that audit with another auditor, and performed the audit by taking down the payroll into our audit program, and eventually sending out the audit report.

[12] Q. Was that more involvement than you would typically have?

A. In this case, yes.

Q. Do you know why that was?

A. It was only our first year of doing audits. I do try and get out, for a client, get on some of the audits, go on some, just to be familiar with any changes I need to make to the audit program. I'm very involved in writing audit programs as well.

Q. So what happened then? Walk us through what happened with regard to—

THE COURT: I'm going to just insert a question again. I don't want to interrupt.

Was this audit of Ray Haluch performed as part of your normal flow of work for Local 98, or was there a conversation you had with anyone that said we particularly want you to audit Ray Haluch or we think there might be a problem with Ray Haluch or there is some special concern that we have about this particular company that has prompted us to ask you to do this audit?

THE WITNESS: This did fall into the category that we got the request from Local 98. We do get requests from benefit funds to do audits. They sometimes give us a heads up. They do sometimes [13] give us information as to something that may be going on, to look for certain information.

We do a complete audit of every employer. We will look -- we don't go in just specifically for that information. We go in and do our audit, follow all our standard procedures on the audit.

* * * *

[51] Q. (By Mr. Wagner:) Mr. Shannon, your firm receives a fee for the audits services performed?

A. Yes, it does.

Q. On behalf of the or for the Local 98 funds?

A. Yes.

MR. WAGNER: Your Honor, may I show the witness a document?

THE COURT: You may.

Q. Do you recognize this document, Mr. Shannon?

A. Yes, I do.

Q. And what is it? Who prepared this or where did this document come from?

A. Okay. This document I ran off our system, [52] which tracks all the hours billed to Local 98 for this one specific audit, the Ray Haluch audit. For each audit of Ray Haluch, any time that was spent on these audits, and it went through December 30th, 2010 when I ran it, comes off our computer system.

Q. And does this cover -- there were no other audits of the Haluch Company for some other time period that we haven't discussed here today, is that correct?

A. That is correct.

Q. And just explaining the document from left to right, the first column, is that an employee number?

A. That would be, yes. That would be a Schultheis & Panettieri employee number.

Q. And then the next line over is the person who performed the work?

A. Yes, that's the employees.

Q. For example, the fourth line down is you?

A. Yes, it is.

Q. And then explain what the rest of the document is.

A. Okay. The rest of the document would then have the date which it was put in, that would either be a specific day or the week ending. The next [53] number over is an internal number that we assigned to each audit. The three means Operating Engineers, 98 would be Local 98. The '07, the year in which we received the request or sent out a request to do the audit, and then a numerical number that we assign to that audit. The name of the employee that we audited would appear in that column.

Then there's a gap. The amount of hours that were put in at that time, the billable rate for that time, and that classification, we have three different classifications of billing, and then the dollars billed for that time. It all sums up for the one audit, that would be the 30098-07-0027, and then the subsequent audit, the 30098-10-0018 for the next audit period. On the very last page, it sums all of those two together.

Q. Now, that is current through the end of October of 2010?

A. The audit would be through October 2010. This would be for any work performed through December 30th, 2010, any time put to the audit.

Q. And you've obviously had subsequent work performed on Local 98 that you would bill in connection with your appearing in this case?

A. Yes, for any kind of preparation for the [54] case and for the case, there will be additional billing.

MR. WAGNER: Your Honor, we'd offer this document into evidence.

THE COURT: All right. Any objection?

MR. CAHILLANE: No objection.

THE COURT: All right. It's admitted as Plaintiff's Exhibit 12, billing records. I'm going to give it to the clerk to put a sticker on it.

(Audit Billing Records marked Plaintiff's Exhibit No. 12 in evidence.)

* * * *

Plaintiff's Trial Exhibit 12
(February 23, 2011)

Schultheis & Panettieri, LLP Payroll Audit
Billing For The Period: 1/1/1900 – 12/31/2999
98 Benefit Funds I.U.O.E. Payroll Audits

12/30/2010 4:10:25 PM
3009899 98 Benefit Funds I.U.O.E. Payroll Audits
Payroll Audit # 30098-07-0027 7361

0220 Robin Doupe	11/13/2007	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	65.00	32.50
0780 Wayne Wolf	12/03/2007	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	92.00	46.00
0780 Wayne Wolf	12/06/2007	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	8.00	92.00	736.00
0780 Wayne Wolf	12/06/2007	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	4.00	92.00	368.00
0660 William Shannon	12/06/2007	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	92.00	46.00
0660 William Shannon	12/10/2007	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	1.00	92.00	92.00

3009899 98 Benefit Funds I.U.O.E. Payroll Audits
Payroll Audit # 30098-07-0027 7361

0660 William Shannon	03/21/2008	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	92.00	46.00
0152 Stephen Bowen	10/09/2008	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	92.00	46.00
0660 William Shannon	12/04/2008	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	92.00	46.00
0660 William Shannon	02/17/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	92.00	46.00
0300 Barbara Gargiulo	02/20/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	65.00	32.50
0561 Lisa Pfrang	04/13/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.25	65.00	16.25
0659 Lawrence Shannon	04/14/2009	30098-07-0027	Ray Haluch Sand & Gravel Co . Inc.	1.50	65.00	97.50
0410 Viorel Kuzma	04/22/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.25	92.00	23.00
0659 Lawrence Shannon	04/22/2009	30098-07-0027	Ray Haluch Sand & Gravel Co . Inc.	8.00	65.00	520.00
0659 Lawrence Shannon	05/01/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	65.00	32.50

3009899 98 Benefit Funds I.U.O.E. Payroll Audits
Payroll Audit # 30098-07-0027 7361

0660 William Shannon	06/23/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	2.00	92.00	184.00
0660 William Shannon	06/25/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	2.00	92.00	184.00
0660 William Shannon	06/29/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	1.00	92.00	92.00
0660 William Shannon	07/02/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	2.00	92.00	184.00
0659 Lawrence Shannon	07/02/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	65.00	32.50
0775 Ellen Williamson	07/07/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	65.00	32.50
0998 Vincent F. Panettieri	07/07/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.10	165.00	16.50
0100 Luann Bishop	07/0812009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.25	65.00	16.25
0152 Stephen Bowen	07/17/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.25	92.00	23.00
0660 William Shannon	07/27/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	2.00	92.00	184.00

3009899 98 Benefit Funds I.U.O.E. Payroll Audits
Payroll Audit # 30098-07-0027 7361

0660 William Shannon	08/24/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	3.00	92.00	276.00
0660 William Shannon	08/26/2009	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	1.00	92.00	92.00
0660 William Shannon	03/19/2010	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	1.00	100.00	100.00
0100 Luann Bishop	06/21/2010	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.25	70.00	17.50
0660 William Shannon	06/23/2010	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	2.00	100.00	200.00
0660 William Shannon	07/06/2010	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	2.00	100.00	200.00
0660 William Shannon	07/12/2010	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	1.00	100.00	100.00
0660 William Shannon	07/13/2010	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	2.00	100.00	200.00
0775 Ellen Williamson	11/08/2010	30098-07-0027	Ray Haluch Sand & Gravel Co., Inc.	0.50	70.00	35.00
			st	**50.35**	x 70.00	**$4,349.50**
Subtotal for 30098-07-0027 Ray Haluch Sand & Gravel Co., Inc.				**50.35**		**$4,349.50**

3009899 98 Benefit Funds I.U.O.E. Payroll Audits
Payroll Audit # 30098-07-0018 7361

0659 Lawrence Shannon	06/04/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	1.50	70.00	105.00
0660 William Shannon	06/11/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	1.00	100.00	100.00
0660 William Shannon	06/15/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	5.00	100.00	500.00
0659 Lawrence Shannon	06/16/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	1.00	70.00	70.00
0660 William Shannon	06/17/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	2.00	100.00	200.00
0660 William Shannon	06/17/2010	30096-10-0016	Ray Haluch Sand & Gravel Co., Inc.	2.00	100.00	200.00
0300 Barbara Gargiulo	06/18/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	0.25	70.00	17.50
0660 William Shannon	06/29/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	2.00	100.00	200.00
0660 William Shannon	09/29/2010	30098-10.0018	Ray Haluch Sand & Gravel Co., Inc.	2.00	100.00	200.00
0137 Angela Mellilo	09/29/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	0.25	100.00	25.00

3009899 98 Benefit Funds I.U.O.E. Payroll Audits
Payroll Audit # 30098-07-0018 7361

0137 Angela Mellilo	09/30/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	1.00	100.00	100.00
0775 Ellen Williamson	09/30/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	0.50	70.00	35.00
0998 Vincent F. Panettleri	10/04/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	0.10	175.00	17.50
0100 Luann Bishop	10/04/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	0.25	70.00	17.50
0660 William Shannon	10/22/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	3.00	100.00	300.00
0660 William Shannon	10/25/2010	30098-10-0018	Ray Haluch Sand & Gravel Co., Inc.	1.00	100.00	100.00
			ms	22.85	x 100.00	$2,187.50
Subtotal for 30098-10-0018 Ray Haluch Sand & Gravel Co., Inc.				**22.85**		**$2,187.50**
Total for 3009899 98 Benefit Funds I.U.O.E. Payroll Audits				**73.20**		**$6,537.00**

Schultheis & Panettieri, LLP Payroll Audit
Billing For The Period: 1/1/1900 – 12/31/2999
98 Benefit Funds I.U.O.E. Payroll Audits

12/30/2010 4:10:34 PM

Hours by Staff Billing Rate Tier

pt	0.10	x	$165.00	$16.50
st	12.50	x	$65.00	$812.50
pt	0.10	x	$175.00	$17.50
st	4.25	x	$70.00	$297.50
ms	27.25	x	$100.00	$2,725.00
ms	29.00	x	$92.00	$2,668.00
	73.20			**$6,537.00**

Total hours for: 3009899-98 Benefit Funds I.U.O.E. Payroll Audits

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WESTERN DIVISION

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 HEALTH AND WELFARE, PENSION AND ANNUITY FUNDS, by Barbara Lane, as Administrator; LOCAL 98 ENGINEERS JOINT TRAINING, RETRAINING, SKILL IMPROVEMENT, SAFETY EDUCATION, APPRENTICESHIP AND TRAINING FUND, by Barbara Lane, as Administrator; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 AND EMPLOYERS COOPERATIVE TRUST, by William Sullivan and Eugene P. Melville, Jr., as Trustees; CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, by Michael R. Fanning, as Chief Executive Officer; and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager,

Plaintiffs,

v.

RAY HALUCH GRAVEL CO.; RAY HALUCH, INC.; RAY HALUCH, INC. d/b/a RAY HALUCH GRAVEL CO.; RAY HALUCH GRAVEL COMPANY, INC.; RAY HALUCH GRAVEL COMPANY, INC. d/b/a RAY HALUCH GRAVEL CO.; RAYMOND HALUCH, Individually and as an Officer of RAY HALUCH, INC. and RAY HALUCH GRAVEL COMPANY, INC.; and RAYMOND HALUCH, Individually and d/b/a RAY HALUGH GRAVEL CO.,

Defendants.

NOTICE OF MOTION

Civil Action No.: 09-CV-11607 (MAP)

Plaintiffs, by their attorneys, Blitman & King LLP, Kenneth L. Wagner, Esq. and Daniel R. Brice, Esq., move this Court for an Order awarding the total attorneys' fees and costs incurred by Plaintiffs in attempting to collect this delinquency, in obtaining the audit, in protecting Plaintiffs' interests, and in protecting the interests of the participants and beneficiaries. Those fees and costs, as set forth in the supporting affidavit of Kenneth L. Wagner, sworn to April 4, 2011 ("Wagner Affidavit"), amount to $143,600.44.

Defendants are liable for these monies pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and for the reasons detailed in the accompanying Wagner Affidavit filed with this Court on April 4, 2011.

DATED: April 5, 2011

BLITMAN & KING LLP

/s/ Kenneth L. Wagner

By: Kenneth L. Wagner, of Counsel
Daniel R. Brice, of Counsel
Attorneys for Plaintiffs
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Franklin Center, Suite 300
443 North Franklin Street
Syracuse, New York 13204-1415
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 HEALTH AND WELFARE, PENSION AND ANNUITY FUNDS, by Barbara Lane, as Administrator; LOCAL 98 ENGINEERS JOINT TRAINING, RETRAINING, SKILL IMPROVEMENT, SAFETY EDUCATION, APPRENTICESHIP AND TRAINING FUND, by Barbara Lane, as Administrator; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 AND EMPLOYERS COOPERATIVE TRUST, by William Sullivan and Eugene P. Melville, Jr., as Trustees; CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, by Michael R. Fanning, as Chief Executive Officer; and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager,

Plaintiffs,

v.

RAY HALUCH GRAVEL CO.; RAY HALUCH, INC.; RAY HALUCH, INC. d/b/a RAY HALUCH GRAVEL CO.; RAY HALUCH GRAVEL COMPANY, INC.; RAY HALUCH GRAVEL COMPANY, INC. d/b/a RAY HALUCH GRAVEL CO.; RAYMOND HALUCH, Individually and as an Officer of RAY HALUCH, INC. and RAY HALUCH GRAVEL COMPANY, INC.; and RAYMOND HALUCH, Individually and d/b/a RAY HALUCH GRAVEL CO.,

Defendants.

AFFIDAVIT OF KENNETH L. WAGNER IN SUPPORT OF PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND COSTS

Civil Action No.:
09-CV-11607 (MAP)

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss:

Kenneth L. Wagner, being duly sworn, deposes and says:

1. I am a partner in the law firm of Blitman & King LLP, attorneys for the Plaintiffs in the above-entitled action, was lead trial counsel, and am familiar with all of the proceedings heretofore had herein.

2. I submit this affidavit in support of Plaintiffs' application for attorneys' fees and costs.

3. In accordance with the collective bargaining agreement, the Trust Agreements, and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, the Defendants are liable for all audit fees, attorneys' fees and costs incurred in collecting the debt.

4. In the event that the Plaintiffs prevail in this action, under ERISA they are mandatorily entitled to recover their reasonable attorneys' fees and costs of the action. 29 U.S.C. § 1132(g)(2)(D). In the First Circuit, the "lodestar" method is used in ERISA cases. *Radford Trust v. First Unum Life Insur. Co.*, 399 F. Supp. 2d 3,10 (D. Mass. 2005).

5. Using the lodestar method in labor and employment litigation, including ERISA cases, this Court has previously approved attorney's fee rates comparable to, or greater than, the rates sought in

this application, which range from a maximum hourly rate of $235 in 2008 to $260 in 2011. *Access 4 All, Inc. v. Deloney Clinton Associates, L.P.*, 2007 U.S. Dist. LEXIS 2085, at *8-9 (January 8, 2007, Neiman, Chief Mag. Judge) (approving maximum rate of $275 for experienced attorney in case under Americans with Disabilities Act) (collecting cases); *see also McGahey v. Harvard University Flexible Benefits Plan*, 685 F. Supp. 2d 181, (in ERISA case, approving core rate of $350 and hourly non-core rate of $225) (collecting cases approving hourly rates between $275 and $350 under ERISA and ADA); *Radford Trust, supra*, 399 F. Supp. 2d at 15-16 (in 2005 case, approving maximum rate of $250 per hour in ERISA action).

6. As indicated in the trial testimony of William Shannon, the Plaintiffs incurred at least $6,537.00 in audit fees and costs in connection with the audits by Schultheis & Panettieri LLP (2/23/11 Tr. 51-54; P. Exh. 12).

7. The Plaintiffs incurred $126,912.30 in attorneys' and paralegals' fees in pursuing collection of Defendants' debt and obtaining compliance with the audit (a copy of a narrative of legal services performed by Blitman & King LLP, with attorney-client privileged information and attorney-work product redacted, containing initials to indicate who performed the services, is attached hereto as Exhibit A).[1]

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[1] Jennifer A. Clark ("JAC"),a partner in Blitman & King LLP, is a graduate of Colgate University (B.A, Economics) and Albany Law School (J.D., *cum laude*). Admitted to the bar in 1982, Ms. Clark's background and experience includes practice before administrative agencies, including the Na-

tional Labor Relations Board, and state and federal courts in connection with various legal actions, including numerous actions under ERISA to collect delinquent fringe benefit contributions owed to employee benefit plans. Ms. Clark has been associated with Blitman & King LLP since 1981.

Kenneth L. Wagner ("KLW"), a partner in Blitman & King LLP, is a graduate of the University of California, Los Angeles (B.A., Philosophy, with departmental honors) and Syracuse University College of Law (J.D., *cum laude*). Admitted to the bar in 1991, Mr. Wagner's background and experience includes practice before administrative agencies, including the National Labor Relations Board, labor arbitration tribunals, and state and federal courts in connection with various legal actions, including actions concerning employee benefit plans. Mr. Wagner has been associated with Blitman & King since 1990.

Daniel R. Brice ("DRB"), a partner in Blitman & King LLP, is a graduate of State University of New York at Oswego (B.A., 1997) and Buffalo Law School (J.D., 2003). Admitted to the New York bar in 2004, Mr. Brice's background and experience includes practice before administrative agencies, including the National Labor Relations Board, and state and federal courts in connection with various legal actions, including actions concerning employee benefit plans. Mr. Brice has been associated with Blitman & King LLP since August 2003.

Daniel E. Kornfeld ("DEK"), a partner in Blitman & King LLP, is a graduate of Cornell University (B.S., Industrial and Labor Relations with honors, 1995) and George Washington University Law School (J.D. with honors, 1998) and Georgetown University Law School (L.L.M., 2001). Admitted to the bars in Maryland (1998), the District of Columbia (1999), and New York (2004). Mr. Kornfeld's background and experience includes practice before administrative agencies, including the National Labor Relations Board, and state and federal courts in connection with various legal actions, including actions concerning employee benefit plans. Mr. Kornfeld has been associated with Blitman & King since October 2003.

Brian J. LaClair ("BJL"), an associate at Blitman & King LLP, is a graduate of the University of Rochester (B.A., History, 2002) and Syracuse University College of Law (J.D., *magna cum laude*, 2006). Admitted to the New York bar in 2007, Mr. LaClair's background and experience includes practice before administrative agencies, including the National Labor Relations Board, and state and federal courts in connection with various legal actions, including actions concerning employee benefit plans. Mr. LaClair has been associated with Blitman & King since December 2009.

Bryan T. Arnault ("BTA"), an associate at Blitman & King LLP, is a graduate of Binghamton University (B.A., *magna cum laude*, 2007) and Boston University School of Law (J.D., cum laude, 2010). Admitted to the Massachusetts and New York bars in 2011, Mr. Arnault's background and experience includes principally legal research in connection with various legal proceedings, including under ERISA. Mr. Arnault has been associated with Blitman & King since September 2010.

Kathleen M. Hart ("KMH") has worked as an ERISA paralegal or administrator of employee benefit plans for approximately 28 years, including 12 years with Blitman & King LLP (1990-1996; 2005-present). She is a graduate of LeMoyne College (B.A.) and attended Syracuse University College Legal Assistant Program (completed four courses toward the Certified Employee Benefits designation through the International Foundation of Employee Benefits Plans).

Jessica L. Ratkowski ("JLR") has worked as a legal secretary since 2000 and has been employed by Blitman & King LLP in a clerical/paralegal capacity since 2004. Her experience has included assisting on numerous actions under ERISA to collect delinquent fringe benefit contributions owed to employee benefit plans.

Linda L. DeMacy ("LLD") has worked as a legal assistant since 1980 and has been employed by Blitman & King LLP in a secretarial/paralegal capacity since December, 1991. Her experience has included assisting on numerous actions under ERISA to collect delinquent fringe benefit contributions owed to employee benefit plans.

8. As indicated by the Narrative of Legal Services attached as Exhibit A, the services performed by this firm's attorneys and staff were reasonable and necessary to obtain compliance with the contractual and statutory obligations of Defendants in the auditing of their books and payroll records; to determine the extent of Defendants' delinquency; and to recover that delinquency, which included, among other things, preparing, filing and serving the Summons and Complaint, preparing and serving required discovery (Rule 26 Statement, Rule 16 Case Management Plan, Request to Admit, Request for Depositions, and Request for Production of Documents), attending conferences regarding the Defendants' attorney's motion to withdraw as counsel, attending, conducting and/or participating in five (5) depositions, investigating the Defendants' allegations, attempting to settle the matter, attending Court-ordered mediation, analyzing audits and calculating the delinquency, reviewing documents produced by Defendants, conferring and corresponding with the Plaintiffs, with Defendants' counsel, and the Court, researching the law and preparing papers in support of the Plaintiffs' motion for summary judgment, preparing papers in reply to the Defendants' answering papers, preparing the Plaintiffs' trial brief, preparing the Plaintiffs' motion *in limine*, preparing and coordinating submission of the parties' Joint Pre-Trial Stipulation, appearing at the final pre-trial conference, preparing and organizing trial exhibits and other trial documents, meeting with and preparing witnesses for their testimony at trial, preparing for and appearing in the trial of this matter on February 22, 23, and 28, 2011, preparing papers in opposition to the Defendants' motion to enforce a purported set-

tlement agreement, and preparing proposed findings of fact and conclusions of law, and supporting brief.

9. In addition to the attorney and paralegal hours expended in this case, costs and disbursements in the amount of $10,151.14 were incurred during the period September 30, 2008 through March 31, 2011 in connection with collection of the delinquent fringe benefit contributions, deductions, interest and liquidated damage. Attached hereto as Exhibit B is a costs listing.

10. Peter A. Janus, Esq., a labor and employment law practitioner based in Hartford, Connecticut has furnished an affidavit concerning the reasonableness of the maximum hourly rate sought in this fee request. Attached hereto as Exhibit C is a copy of the affidavit.

11. The total attorneys' fees and costs incurred by Plaintiffs in attempting to collect this delinquency, in obtaining the audit, in protecting Plaintiffs' interests, and in protecting the interests of the participants and beneficiaries, amount to $143,600.44 through March 31, 2011 (see P. Exh. 12; Exhibits A and B).

/s/ Kenneth L. Wagner
Kenneth L. Wagner

Sworn to before me this
4th day of April 2011.

/s/ Julienne A. Scaravillo
JULIENNE A. SCARAVILLO
Notary Public,
State or New York
Qualified in Onondaga County No. 4766498
Commission Expires November 30, 2014

I hereby certify that a true copy of the above document was served upon the attorney of record for Defendants, by electronically filing the document using the CM/ECF system on April 4, 2011.

/s/ Kenneth L. Wagner
Kenneth L. Wagner, of Counsel

Blitman & King LLP

Narrative of Services

Client: IUOE LOCAL 98 FRINGE BENEFIT FUNDS COLLECTIONS

Matter: RAY HALUCH SAND & GRAVEL**

Date	Employee	Hours	Amount	Description
09/30/08	JAC	0.25	58.75	Received and reviewed debt information and memorandum; Drafted Attorney Work Product ("AWP") memorandum
10/09/08	DRB	0.25	58.75	Communicated with Auditor Bowen regarding calculations
11/10/08	DRB	0.40	94.00	Communicated with auditor regarding information obtained from employer; Conferred regarding information and drafted letter to employer regarding bonus and rewards
12/04/08	DRB	0.30	70.50	Communicated with Auditor Bowen regarding attempts to obtain records from Ray Haluch; Worked on letter to debtor demanding records for audit
12/05/08	DRB	0.20	47.00	Communicated with Auditor Bowen regarding books needed for audit
12/08/08	JAC	0.20	47.00	Worked on letter to debtor demanding records to conclude audit and reviewed file

Date	Employee	Hours	Amount	Description
12/09/08	DRB	0.20	47.00	Communicated with auditors regarding records needed to conclude audit
12/12/08	JAC	0.10	23.50	Worked on letter demanding audit
01/13/09	DRB	0.20	49.40	Worked on correspondence to Funds' auditor for determination if company has cooperated with auditors
02/12/09	DRB	0.50	123.50	Communicated with opposing attorney regarding authority to review books and records; Reviewed Trust Agreement and Collection Policy; Drafted letter to opposing attorney regarding Trust Agreement and Collection Policy
02/19/09	DRB	0.20	49.40	Communicated with auditor regarding upcoming audit and Ray Haluch's non compliance
02/20/09	JAC	0.10	24.70	Communicated with Auditor Shannon regarding debtor's refusal to allow audit
03/02/09	JAC	0.25	61.75	Reviewed collective bargaining agreement; Drafted memorandum (A WP) and worked on letter to Attorney for Haluch regarding same
03/03/09	DRB	0.50	123.50	Researched First Circuit law regarding the right of Fund Trustees to conduct audit under ERISA; Drafted correspondence to auditor regarding status of audit

Date	Employee	Hours	Amount	Description
03/06/09	JAC	0.25	61.75	Researched Funds' right to audit and binding nature of Trusts on employer and worked on letter to Attorney Cahillane explaining audit rights
03/11/09	DRB	0.30	74.10	Worked on letter to opposing counsel regarding audit; Communicated with Auditor Shannon regarding scheduling audit
04/09/09	DRB	0.20	49.40	Communicated with Auditor Shannon regarding audit
04/13/09	DRB	0.50	123.50	Communicated with Auditor Shannon regarding audit; Drafted Memorandum to file (AWP); Drafted letter to Attorney Cahillane concerning conditions on the audit disclosure
04/13/09	JAC	0.20	49.40	Received and reviewed letter from Attorney Cahillane regarding audit restrictions and drafted memorandum (AWP)
04/15/09	DRB	0.40	123.50	Communicated with Attorney Cahillane regarding request for audit restrictions; Worked on letter to Attorney Cahillane regarding audit rights; Conferred regarding same
04/15/09	JAC	0.10	24.70	Worked on letter to Attorney Cahillane regarding parties having access to audit results and information
04/21/09	DRB	0.30	74.10	Reviewed letter from Attorney Cahillane regarding disclosure of audit; Drafted letter to Attorney Cahillane regarding audit and disclosure to Union

Date	Employee	Hours	Amount	Description
04/22/09	DRB	0.30	74.10	Researched and analyzed cases regarding Union access to audit Information
04/22/09	DEK	0.10	24.70	Conferred concerning audit procedures
04/23/09	JAC	0.20	49.400	Received and reviewed letter from defense counsel regarding audit rights of Funds and Union and worked on letter to defense counsel rejecting attempt to limit access to records; Reviewed collective bargaining agreement regarding audit rights
04/24/09	DRB	0.20	49.40	Researched and analyzed ERISA case law regarding right of union to access information from audit
04/28/09	JAC	0.10	24.70	Conferred regarding audit rights of Funds
04/30/09	DRB	0.40	98.80	Worked on letter to Business Manager Melville regarding audit; Conferred regarding same
06/23/09	DRB	0.75	185.25	Communicated with Administrator Lane regarding status of case; Communicated with Auditor Shannon regarding status of audit; Drafted memorandum to file (AWP)
07/24/09	DRB	0.20	49.40	Conferred regarding audit

Date	Employee	Hours	Amount	Description
07/27/09	DRB	0.80	197.60	Communicated with Auditor Shannon regarding case; Reviewed invoices related to equipment rental; Conferred regarding same; Communicated with Union Office Manager Tetreault regarding audit; Communicated with Business Manager Melville regarding audit
07/28/09	DRB	0.40	98.80	Analyzed Massachusetts federal and state law regarding discovery and options to obtain Company information in an efficient manner
07/28/09	JAC	0.40	98.80	Conferred regarding delinquency
07/29/09	DRB	0.40	98.80	Conferred regarding delinquency, proper methods to protect the interest of the Funds and Union in regard to delinquency
07/30/09	DRB	0.50	123.50	Drafted letter to employer requesting information; Reviewed audit report and file
07/30/09	JAC	0.25	61.75	Worked on letter to Attorney Cahillane itemizing documents to be produced concerning equipment rented from Downey
07/31/09	JLR	0.50	67.00	Reviewed audit from Schultheis & Panettieri, LLP covering the period January 1, 2005 to March 31, 2009; Reviewed collective bargaining agreement; Prepared spreadsheets and calculated fringe benefit contributions, deductions, interest and liquidated damages due for the period January 1, 2005 to March 31, 2009

Date	Employee	Hours	Amount	Description
07/31/09	DRB	0.20	24.70	Reviewed calculations and audit; Conferred regarding same
08/21/09	DRB	0.40	98.80	Conferred regarding strategy to collect delinquency; Reviewed file and employer response to request for documents; Drafted letter to company attorney regarding debt and lawsuit
08/24/09	DRB	1.40	345.80	Drafted ERISA/ LMRA complaint to collect debt and compel Audit; Communicated with Auditor Shannon regarding debt
8/26/09	DRB	0.70	172.90	Communicated with auditor regarding audit and proper name of company; Reviewed information regarding corporation; Drafted letter to Town Clerk requesting Ray Haluch Business Certificates; Reviewed audit
08/27/09	JAC	0.40	98.80	Worked on ERISA/ LMRA Summons, Complaint and Civil Cover Sheet and reviewed file and drafted memorandum regarding issues
08/28/09	DRB	0.20	49.40	Communicated with Fund Office regarding ERISA/LMRA litigation
08/31/09	DRB	0.50	123.50	Worked on ERISA/ LMRA Complaint; Reviewed Trust Agreements regarding audit rights and presumptions upon employer's failure to produce records
09/01/09	DRB	0.20	49.40	Conferred regarding case; Reviewed correspondence from opposing counsel

Date	Employee	Hours	Amount	Description
09/01/09	JAC	0.10	24.70	Conferred regarding company refusal to produce records for audit and pay claim and filing ERISA/ LMRA action
09/02/09	JLR	0.35	46.90	Reviewed audit dated August 26, 2009; Prepared spreadsheets and calculated delinquent fringe benefit contributions, deductions, interest and liquidated damages
09/03/09	DRB	0.30	74.10	Worked on ERISA/ LMRA Complaint; Reviewed audit
09/03/09	JAC	0.10	24.70	Received and reviewed letter of Attorney Cahillane objecting to payment or producing records; Reviewed audit and drafted memorandum (AWP)
09/08/09	DRB	0.75	185.25	Conferred regarding progress of case; Drafted letter to Ray Haluch, Inc. regarding audit; Communicated with Union Office Manager Tetreault regarding case; Reviewed trust agreements regarding presumption that hours of work are covered
09/08/09	JAC	0.20	49.40	Conferred regarding entitlement to records and ERISA presumption of same
09/09/09	JAC	0.60	148.20	Reviewed file, including information regarding company signatory to collective bargaining agreement, company signatory to checks, history of relationship and worked on ERISA/LMRA Complaint against corporation, d/b/a and individual

Date	Employee	Hours	Amount	Description
09/09/09	DRB	0.80	197.60	Worked on ERISA/LMRA Complaint
09/10/09	DRB	0.20	49.40	Communicated with Union Office Manager Tetreault regarding Contract
09/10/09	JAC	0.10	24.70	Conferred regarding parties to action and theory of Ray Haluch Inc., liability (AWP)
09/15/09	JAC	0.75	185.25	Worked on ERISA/LMRA Summons and Complaint against officer, debtor and alter egos
09/16/09	DRB	0.50	123.50	Worked on ERISA/LMRA Complaint
09/21/09	JAC	0.25	61.75	Worked on ERISA/ LMRA Complaint against officers and alter egos
09/23/09	DRB	0.40	98.80	Worked on ERISA/ LMRA Complaint; Communicated with counsel for company regarding information request
09/28/09	DRB	0.75	185.25	Drafted letter to Hampden County Sheriff for service of ERISA/LMRA Summons and Complaint; Drafted letter to Department of Treasury and Labor regarding ERISA/LMRA Complaint; Reviewed procedures for serving ERISA/LMRA Summons; Communicated with Hampden County Sheriff's Department regarding service

Date	Employee	Hours	Amount	Description
10/13/09	DRB	0.30	74.10	Reviewed Federal Rules of Civil Procedure regarding service and Massachusetts state law regarding service; Communicated with Sheriff's Department regarding service of process of ERISA/LMRA Summons and Complaint
10/14/09	DRB	0.60	148.20	Communicated with Sheriff's office regarding service of ERISA/LMRA Summons and Complaint; Reviewed local rules regarding filing ERISA/LMRA Summons; Reviewed Massachusetts law regarding service
10/21/09	DRB	0.40	98.80	Drafted stipulation extending time to answer ERISA/LMRA Complaint; Conferred regarding same; Communicated with Federal Court Clerk's office regarding judicial assignment
10/27/09	DRB	3.40	839.80	Communicated with Federal Court Clerk regarding Reassignment; Drafted FRCP Rule 26 initial disclosures; Drafted FRCP request to admit, subpoenas, request for production of documents, deposition notice; Researched Massachusetts local rules and Federal Rules of Civil Procedure regarding discovery
10/29/09	DRB	1.50	370.50	Researched Federal and local rules; Drafted Rule 16 Statement, Rule 16 motion and proposed settlement letter
10/29/09	JAC	0.10	24.70	Conferred regarding ERISA/LMRA discovery
11/02/09	DRB	0.50	123.50	Reviewed and compared defendants' answer with ERISA/LMRA Complaint

Date	Employee	Hours	Amount	Description
11/06/09	DRB	0.20	49.40	Reviewed docket and local rules regarding discovery and scheduling conference
11/23/09	DRB	0.25	61.75	Reviewed local rules regarding discovery; Drafted letter to defendants' counsel regarding same
11/25/09	DRB	0.10	24.70	Reviewed court order regarding upcoming court conference and Joint Statement
12/02/09	DRB	0.20	49.40	Worked on Rule 16 Statement
12/04/09	DRB	0.70	172.90	Worked on Rule 16 Statement; Communicated with Administrator Lane regarding ERISA/ LMRA litigation; Communicated with court regarding conference
12/15/09	DRB	0.20	49.40	Communicated with Administrator Lane regarding ERISA/LMRA litigation
12/18/09	DRB	2.60	642.20	Worked on Request for Production of Documents, Notice of Deposition and initial disclosures; Researched Federal Rules of Civil Procedure and Massachusetts District Court Local Rules regarding discovery
12/21/09	DRB	1.00	247.00	Communicated with Administrator Lane regarding ERISA/LMRA litigation; Conferred regarding discovery requests; Worked on Notice of Deposition, Request for Production of Documents, and Request for Admissions

Date	Employee	Hours	Amount	Description
12/21/09	JAC	0.10	24.70	Conferred regarding Rule 16 conference, statutory presumptions and request to admit
12/22/09	DRB	0.25	61.75	Communicated with opposing counsel regarding ERISA/LMRA litigation
12/22/09	JAC	0.85	209.95	Worked on Funds' initial Rule 26 disclosures; Worked on Funds' Deposition Notice; Worked on Funds' Request to Produce; Worked on Funds' Request to Admit
12/22/09	JAC	0.10	24.70	Conferred regarding Request to Admit and discovery of records
12/29/09	DRB	0.75	183.25	Worked on Joint Statement and Notice of Deposition; Communicated with opposing counsel regarding Joint Statement and discovery
12/30/09	DRB	0.20	49.40	Worked on letter to opposing counsel regarding Rule 16 Joint Statement; Worked on Rule 16 Joint Statement
01/05/10	DRB	0.20	50.40	Worked on letter to opposing counsel regarding discovery; Worked on Initial Disclosures in Federal Court action
01/06/10	DRB	0.60	151.20	Reviewed Federal Rules of Civil Procedure; Finalized Rule 26(a)(1) Initial Disclosures; Finalized discovery papers
01/07/10	DRB	0.70	176.40	Reviewed materials related to presumption defendants' work was covered work; Prepared for upcoming court conference

Date	Employee	Hours	Amount	Description
01/08/10	DRB	10.30	2,595.60	Attended motion term in Massachusetts Federal Court; Argued facts and law in support of Funds' claims and responded to employer's defenses before the Judge; Discussed discovery with opposing counsel, agreed to relevant dates for discovery
01/11/10	JAC	0.10	25.20	Conferred regarding outcome of Rule 16 Conference
01/11/10	DRB	0.50	126.00	Drafted Notice of Deposition; Reviewed Federal Rules regarding depositions; Corresponded with local counsel regarding availability for deposition
01/12/10	DRB	0.80	201.60	Reviewed audit; Researched and analyzed federal law regarding subpoenas; Communicated with Sheriff's office regarding service of subpoena; Worked on subpoena; Drafted letter to process server regarding service of subpoena; Communicated with Administrator Lane regarding depositions
01/13/10	DRB	0.20	50.40	Finalized letter to opposing counsel regarding deposition of Martin Jagodowski
01/14/10	DRB	0.60	151.20	Researched and analyzed Federal Rules, local rules and commentary regarding subpoenas; Worked on and finalized subpoena
01/19/10	DRB	0.30	75.60	Communicated with Hampden County Sheriff's Department regarding service of subpoena; Drafted memorandum to file regarding same

Date	Employee	Hours	Amount	Description
02/02/10	DRB	0.30	75.60	Reviewed subpoena of Todd Downey and discovery requests; Conferred regarding discovery
02/02/10	JAC	0.10	25.20	Received and reviewed Affidavit of Service of Subpoena on Todd Downey and drafted memorandum regarding procedure
02/02/10	JAC	0.10	25.20	Conferred regarding deposition procedure and areas of inquiry at deposition
02/05/10	DRB	0.60	151.20	Communicated with opposing counsel regarding proposal to mediate dispute; Reviewed local rules regarding mediation; Reviewed employer initial disclosures and local rules regarding filing same
02/10/10	DRB	0.20	50.40	Communicated with opposing counsel regarding discovery responses and mediation
02/11/10	DRB	0.20	50.40	Drafted and sent correspondence to opposing counsel scheduling depositions
02/11/10	JAC	0.25	63.00	Received and reviewed debtor's notice to terminate collective bargaining agreement; Reviewed collective bargaining agreement termination provision; Drafted AWP memorandum

Date	Employee	Hours	Amount	Description
02/17/10	DRB	0.90	226.80	Reviewed and analyzed collective bargaining agreement regarding work performed; Analyzed company information on company website regarding work performed by company; Conferred regarding same; Communicated with Business Manager Melville regarding contract termination; Drafted letters to Raymond Haluch regarding contract termination
02/18/10	DRB	1.00	252.00	Drafted questions for depositions of Ray Haluch, Todd Downey, and Martin Jagodowski; Reviewed discovery responses; Drafted letter to Todd Downey regarding deposition; Corresponded with opposing counsel regarding scheduling depositions
02/19/10	DRB	1.80	453.60	Communicated with opposing counsel regarding depositions; Worked on deposition questions; Reviewed file related to potential exhibits; Corresponded with auditor regarding invoices; Communicated with Vice President Skorupski regarding depositions; Drafted new deposition notice for Jagodowski
02/22/10	DRB	0.70	176.40	Communicated with Fund Office regarding employer; Reviewed calculations; Sent correspondence to opposing counsel regarding availability for depositions and scheduling same
02/23/10	DRB	0.90	226.80	Worked on questions in preparation for deposition; Worked on deposition exhibits

Date	Employee	Hours	Amount	Description
02/25/10	DRB	0.60	151.20	Communicated with opposing counsel regarding discovery responses and need for documents prior to holding depositions; Drafted letter to opposing counsel and Todd Downey regarding depositions and discovery
02/26/10	DRB	0.60	151.20	Finalized letter to opposing counsel regarding deadline for discovery response and adjournment of depositions pending response; Researched and analyzed federal law regarding subpoenas; Communicated with Todd Downey regarding deposition
03/15/10	DRB	0.80	201.60	Reviewed discovery demands; Drafted letter to opposing counsel regarding discovery and failure of defendants to respond; Reviewed correspondence related to defendants' attempt to terminate contract; Researched Federal Rules of Civil Procedure regarding discovery responses
03/17/10	DRB	0.60	151.20	Reviewed opposing counsel letter regarding discovery; Contacted opposing counsel regarding discovery deadline; Drafted letter to opposing counsel regarding discovery deadlines and settlement
03/19/10	JAC	0.40	100.80	Received and reviewed defendants' objection to Request to Produce; Conferred regarding same; Worked on response to defendant's objection

Date	Employee	Hours	Amount	Description
03/19/10	DRB	2.00	504.00	Reviewed discovery responses; Conferred regarding same; Reviewed and analyzed Federal Rules of Civil Procedure regarding discovery responses and objections; Drafted and worked on response to employer's objections
03/22/10	DRB	0.40	100.80	Researched Federal Rules of Civil Procedure regarding disclosure requirements as they relate to documents received pursuant to subpoena
03/29/10	DRB	0.40	100.80	Reviewed discovery materials; Communicated with opposing counsel's office regarding discovery and production; Drafted AWP memorandum to file
03/31/10	DRB	0.20	50.40	Drafted letter to opposing counsel demanding production of documents
04/01/10	DRB	0.10	25.20	Worked on letter to opposing counsel regarding discovery and production of documents
04/05/10	DRB	0.75	189.00	Reviewed discovery request and response; Communicated with Auditor Shannon regarding documents necessary to complete audit; Conferred regarding litigation; Communicated with Administrator Lane regarding litigation; Reviewed Trust Agreements regarding language on failure to maintain records
4/05/10	JAC	0.20	50.40	Conferred regarding issues in dispute and strategy regarding discovery and obtaining evidence for case

Date	Employee	Hours	Amount	Description
04/06/10	JAC	0.25	63.00	Communicated with President Melville regarding litigation
04/08/10	DRB	0.80	201.60	Reviewed file, including calculations, in preparation for meeting with Trustees to discuss status of litigation; Communicated with opposing counsel regarding lack of communications with his client; Drafted AWP memorandum to file; Reviewed audit and remittance reports to determine if Ray Haluch's alleged hours were reported
04/09/10	DRB	0.25	63.00	Communicated with Trustees regarding status of litigation
04/09/10	JAC	0.25	63.00	Communicated with Board of Trustees regarding status of litigation
04/12/10	DRB	0.30	75.60	Worked on letter to opposing counsel regarding scheduling depositions; Reviewed prior discovery requests
04/14/10	DRB	0.50	126.00	Reviewed opposing counsel's Motion to Withdraw; Drafted letter to Judge regarding motion
04/19/10	DRB	0.25	63.00	Communicated with court clerk regarding Motion to Withdraw hearing; Reviewed Court Notice regarding hearing
04/21/10	DRB	0.20	50.40	Drafted letter to company counsel regarding continuing obligation under the agreement
04/21/10	JAC	0.10	25.20	Communicated with Administrator Lane regarding company and litigation

Date	Employee	Hours	Amount	Description
04/27/10	DRB	1.70	428.40	Participated in court conference regarding defense counsels' Motion to Withdraw
04/27/10	JAC	0.20	50.40	Conferred regarding motion of defense counsel to withdraw
04/28/10	DRB	0.60	151.20	Reviewed discovery request and responses; Prepared arguments regarding production of documents in preparation for meeting with opposing counsel
05/05/10	DRB	0.30	75.60	Communicated with opposing counsel regarding discovery
05/07/10	DRB	1.40	352.80	Drafted letter to Sheriff regarding service of subpoena on Martin Jagodowski; Drafted subpoena to be served on Mr. Jagodowski; Researched Federal Rules regarding service of subpoena; Communicated with Sheriff's office regarding subpoena; Drafted AWP memorandum to file regarding conversation with opposing counsel regarding discovery; Communicated with Mr. Jagodowski regarding deposition; Drafted AWP memorandum to file regarding same
05/12/10	DRB	0.20	50.40	Communicated with opposing counsel regarding discovery and deposition of Ray Haluch
05/13/10	DRB	4.00	1,008.00	Worked on Notice of Motion to Compel Discovery, Attorney Affidavit, Memorandum of Law and Melville Affidavit

Date	Employee	Hours	Amount	Description
05/17/10	DRB	0.20	50.40	Drafted letter to Judge Hillman regarding alternative dispute resolution mediation
05/18/10	DRB	0.60	151.20	Reviewed debtor's amended discovery response; Drafted reply to company counsel regarding inadequate response; Communicated with Administrator Lane regarding July mediation
05/19/10	DRB	1.40	352.80	Reviewed defendants' responses to plaintiffs' request for documents; Worked on reply to company; Communicated with Administrator Lane regarding mediation
05/19/10	JAC	0.10	25.20	Conferred regarding review of documents and payroll audit
05/24/10	DRB	1.50	378.00	Reviewed response to discovery requests; Communicated with Auditor Shannon regarding updating audit; Worked on letter to opposing counsel regarding document review
05/24/10	JAC	0.20	50.40	Conferred regarding discovery
05/25/10	DRB	0.50	126.00	Reviewed discovery requests and response; Determined what documents will be made available
05/28/10	DRB	0.90	226.80	Communicated with auditor regarding inspecting books and records of company; Drafted questions in preparation for Martin Jagodowski deposition
06/01/10	DRB	0.10	25.20	Worked on and sent correspondence to opposing counsel regarding discovery

Date	Employee	Hours	Amount	Description
06/01/10	JAC	0.10	25.20	Conferred regarding status of discovery and Motion to Compel Discovery
06/02/10	DRB	1.40	252.00	Communicated with opposing counsel regarding discovery; Drafted letter to judge regarding discovery dispute; Drafted AWP memorandum to file regarding conversation with opposing counsel regarding discovery dispute; Prepared for depositions of Haluch and Jagodowski
06/03/10	DRB	2.50	630.00	Prepared for depositions of Downey, Jagodowski and Haluch; Communicated with opposing counsel regarding document review; Drafted and sent correspondence to opposing counsel regarding document review; Drafted and sent correspondence to Attorney Weiner regarding place of deposition; Worked on letter to Judge regarding discovery dispute
06/04/10	DRB	0.75	189.00	Communicated with auditor regarding upcoming audit; Reviewed file regarding scheduling audit; Communicated with opposing counsel regarding document review
06/04/10	JAC	0.10	25.20	Conferred regarding review of documents and additional audit

Date	Employee	Hours	Amount	Description
06/08/10	DRB	2.00	504.00	Drafted letter to opposing counsel regarding deposition; Communicated with Todd Downey regarding deposition; Drafted letters to Downey and Jagodowski regarding same; Communicated with Union office regarding deposition; Drafted and sent correspondence to local counsel regarding confirmation of deposition; Prepared for depositions
06/09/10	DRB	0.90	226.80	Prepared for depositions; Reviewed Federal Rules of Civil Procedure and Local Rules regarding depositions; Communicated with auditor regarding audit; Conferred regarding same
06/14/10	DRB	1.20	302.40	Prepared for depositions and document review; Reviewed and prepared exhibits
06/15/10	DRB	10.50	2,646.00	Attended audit/document review at defendants' accountant's office; Reviewed and analyzed documents related to company; Prepared for depositions; Conferred with Auditor Shannon
06/16/10	DRB	10.20	2,570.40	Prepared for, attended and deposed Jagodowski and Downey regarding hours of work in question

Date	Employee	Hours	Amount	Description
06/17/10	DRB	1.80	453.60	Conferred regarding ERISA/LMRA litigation; Communicated with Auditor Shannon regarding calculations; Reviewed audit and calculations; Drafted AWP memorandum to file; Contacted opposing counsel regarding deposition of auditor; Drafted and sent correspondence to opposing counsel regarding individual tax return; Worked on letter to court regarding discovery
06/17/10	JAC	0.25	63.00	Conferred regarding discovery and delinquency
06/18/10	DRB	1.80	453.60	Communicated with Auditor Shannon regarding documents and deposition; Communicated with opposing counsel's office regarding deposition; Reviewed and worked on letter to opposing counsel regarding discovery; Worked on letter motion to Judge Neiman regarding tax returns; Drafted letter in response to notice of deposition; Researched Federal Rules of Civil Practice regarding depositions
06/18/10	KLW	0.25	63.00	Conferred regarding discovery items
06/21/10	DRB	1.50	378.00	Communicated with Auditor Shannon regarding deposition; Communicated with opposing counsel regarding deposition of auditors; Drafted mediation letter to Judge Hillman; Conferred regarding status of case
06/21/10	JAC	0.20	50.40	Conferred regarding terms of settlement and mediation authority

Date	Employee	Hours	Amount	Description
06/23/10	DRB	2.00	504.00	Reviewed materials provided by auditor in preparation for deposition; Communicated with auditor regarding deposition; Worked on mediation brief to Judge Hillman; Conferred regarding same
06/24/10	DRB	2.00	504.00	Worked on mediation letter brief to Judge Hillman; Communicated with opposing counsel regarding deposition; Reviewed invoices and payroll records; Reviewed letter from opposing counsel regarding depositions; Communicated with auditors regarding depositions; Worked on letter to opposing counsel regarding depositions
06/25/10	DRB	1.30	327.60	Reviewed and analyzed materials regarding deposition of auditor; Communicated with Auditor Shannon regarding audit; Researched and analyzed Federal Rules of Civil Procedure regarding depositions of non-parties
06/28/10	DRB	0.90	226.80	Reviewed auditor information; Drafted and sent correspondence to opposing counsel regarding auditor deposition; Worked on position letter brief to Judge Hillman
06/29/10	DRB	2.00	504.00	Worked on letter brief to Judge Hillman for upcoming mediation; Reviewed auditor information; Drafted letter to opposing counsel

Date	Employee	Hours	Amount	Description
06/30/10	DRB	0.90	226.80	Worked on request for additional documents and dates for deposition of Raymond Haluch and Joanne Martins; Communicated with Administrator Lane regarding settlement
06/30/10	JAC	0.20	50.40	Communicated with Administrator Lane regarding mediation
7/1/2010	DRB	2.50	630.00	Researched Federal Rules of Civil Practice regarding initial disclosure and amendment; Worked on request for additional documents; Reviewed prior disclosures and discovery correspondence regarding tax return dispute; Drafted Attorney Work Product summary memoranda of Jagodowski and Downey testimony
7/5/2010	DRB	0.30	75.60	Reviewed documents in preparation for auditor phone conference and mediation
7/6/2010	JAC	0.20	50.40	Conferred regarding preparation of auditor for deposition and issue of privilege
7/6/2010	DRB	2.10	529.20	Communicated with court clerk regarding mediation; Drafted and sent correspondence to court clerk regarding same; Conference with Auditor Shannon in preparation for upcoming deposition; Prepared for deposition
7/12/2010	DRB	1.60	403.20	Communicated with opposing counsel's office to confirm deposition; Communicated with Administrator Lane regarding mediation; Prepared for mediation; Reviewed settlement authority

Date	Employee	Hours	Amount	Description
7/13/2010	DRB	9.00	2,268.00	Prepared for and attended auditor deposition in Massachusetts; Communicated with Fund Office regarding mediation
7/14/2010	DRB	8.00	2,016.00	Represented Funds at mediation, advocated on Funds' behalf; Multiple conferences with Judge Hillman and Administrator Lane regarding case; Conferenced with opposing counsel regarding upcoming deposition
7/15/2010	DRB	0.40	100.80	Communicated with Auditor Shannon regarding deposition; Conferred regarding depositions and mediation
7/19/2010	JAC	0.40	100.80	Conferred regarding litigation strategy, mediation, and depositions
7/20/2010	DRB	0.80	201.60	Communicated with Matthew Jagodowski regarding deposition; Drafted letter to opposing counsel regarding deposition of Ray Haluch; Reviewed Trust Agreements; Reviewed applicable collective bargaining agreement
7/20/2010	JAC	0.10	25.20	Conferred regarding employee's execution of Affidavit regarding hours of covered employment
7/21/2010	DRB	0.40	100.80	Communicated with Fund Office regarding Matthew Jagodowski; Communicated with Martin Jagodowski regarding case
7/26/2010	DRB	0.20	50.40	Reviewed and analyzed defendants' request for documents; Reviewed Federal Rules and guidance materials regarding response

Date	Employee	Hours	Amount	Description
7/29/2010	DRB	0.80	201.60	Reviewed and analyzed deposition transcript of Auditor Shannon, Drafted letter to court reporter regarding errata sheet
7/30/2010	DRB	0.40	100.80	Worked on Response to defendants' discovery request
8/3/2010	DRB	0.70	176.40	Worked on Response to defendants' discovery request; Worked on legal narrative of services rendered
8/5/2010	DRB	0.90	226.80	Worked on Response to defendants' discovery request; Worked on legal narrative of services rendered
8/6/2010	DRB	0.40	100.80	Worked on legal narrative of services rendered; Prepared for deposition of Ray Haluch
8/9/2010	DRB	1.30	327.60	Prepared for Martins/Haluch depositions; Worked on Response to defendants' discovery request
8/11/2010	DRB	0.40	100.80	Worked on Response to defendants' discovery request; Reviewed remittance reports; Communicated with Michelle from Fund Office regarding reports
8/12/2010	DRB	0.20	50.40	Worked on Response to defendants' discovery request
8/13/2010	DRB	0.40	100.80	Prepared for depositions of Martins and Haluch
8/16/2010	DRB	2.30	579.60	Worked on Response to defendants' discovery request; Prepared for depositions of Martins and Haluch

Date	Employee	Hours	Amount	Description
8/17/2010	JAC	0.10	25.20	Received and reviewed memorandum regarding amendments to Plans and issue of attorney-work product
8/17/2010	DRB	3.50	882.00	Prepared for depositions of Martins and Haluch
8/18/2010	DRB	8.00	2,016.00	Prepared for depositions of Martins and Haluch; Deposed Ray Haluch and Joanne Martins
8/19/2010	DRB	0.70	176.40	Communicated with Union Office regarding contracts; Reviewed and analyzed litigation strategy; Reviewed discovery documents
8/19/2010	JAC	0.20	50.40	Conferred regarding outcome of depositions of debtors
8/20/2010	DRB	0.50	126.00	Reviewed prior contracts; Drafted letter to opposing counsel regarding discovery
8/20/2010	JAC	0.20	50.40	Worked on Narrative of Legal Services for production pursuant to defendants' request
8/25/2010	JAC	0.30	75.60	Worked on Narrative of Legal Services for disclosure to defense counsel
8/26/2010	DRB	0.10	25.20	Worked on Response to defendants' discovery request; Worked on legal narrative for services rendered
8/30/2010	DRB	0.40	100.80	Worked on Response to defendants' discovery request; Worked on legal narrative for services rendered

Date	Employee	Hours	Amount	Description
8/31/2010	DRB	0.70	176.40	Worked on legal narrative, response to defendants' request for information; Revised letter to opposing counsel regarding response
8/31/2010	JAC	0.50	126.00	Worked on Narrative of Legal Services
9/1/2010	DRB	0.60	151.20	Worked on Response to defendants' discovery request; Finalized letter to opposing counsel regarding discovery and Response
9/3/2010	DRB	1.10	277.20	Worked on motion for summary judgment, attorney affidavit and notice; Reviewed Local Rules regarding summary judgment motions
9/7/2010	DRB	3.70	932.40	Worked on motion for summary judgment, affidavits of Shannon, Lane, Melville, Fanning, and attorney; Researched applicable law regarding initial disclosures
9/8/2010	JAC	0.10	25.20	Conferred regarding filing Summary Judgment Motion and evidence in support of same
9/9/2010	DRB	2.40	604.80	Worked on motion for summary judgment affidavits for Barbara Lane, Eugene Melville, William Shannon, Michael Fanning, paralegal and attorney
9/13/2010	DRB	2.30	579.60	Worked on Affidavits of Lane, Melville, Fanning, Shannon, paralegal and attorney for motion for summary judgment

Date	Employee	Hours	Amount	Description
9/14/2010	DRB	0.70	176.40	Worked on motion for summary judgment Affidavits for Lane, Melville, Fanning, Shannon, paralegal and attorney
9/15/2010	DRB	2.70	680.40	Worked on motion for summary judgment Affidavits for Lane, Melville, Fanning, Shannon, paralegal and attorney
9/16/2010	DRB	1.60	403.20	Worked on motion for summary judgment Affidavits for Lane, Melville, Fanning, Shannon, paralegal and attorney
9/20/2010	DRB	0.80	201.60	Reviewed and analyzed deposition transcript of Haluch
9/22/2010	DRB	1.70	428.40	Worked on Memorandum of Law in support motion; Researched Federal Rules of Civil Procedure regarding changes to deposition transcript
9/23/2010	DRB	0.50	126.00	Worked on Memorandum of Law in Support of motion for summary judgment; Reviewed deposition transcripts
9/28/2010	JAC	1.60	403.20	Worked on Attorney Affidavit, Union Affidavit, Funds' Affidavit, Central Pension Fund Affidavit, Paralegal Affidavit, Auditor Affidavit and Exhibits on motion for summary Judgment
9/29/2010	DRB	0.90	226.80	Worked on Affidavits of Fanning, Shannon, paralegal, Lane, Melville and attorney
9/29/2010	JAC	0.75	189.00	Conferred regarding motion for partial summary judgment, proof of damages, evidentiary issues, burden of proof to establish damages

Date	Employee	Hours	Amount	Description
9/30/2010	DRB	3.80	957.60	Worked on Affidavits for Fanning, Melville, Lane, Shannon, paralegal and attorney
10/1/2010	DRB	1.70	428.40	Worked on motion for summary judgment affidavits of Lane, Shannon, Fanning, paralegal and attorney; Analyzed Martins Deposition
10/3/2010	DRB	1.80	453.60	Worked on motion for summary judgment Affidavits of Lane, Shannon, Melville, Fanning, paralegal and attorney; Analyzed Martins deposition
10/4/2010	JAC	0.20	50.40	Conferred regarding strategy on motion for judgment to obtain damages prospectively
10/4/2010	DRB	0.70	176.40	Worked on motion for summary judgment Affidavits of Lane, Shannon, Melville, Fanning, paralegal and attorney; Conferred regarding same; Communicated with Auditor Shannon regarding case
10/5/2010	DRB	1.10	277.20	Worked on summary judgment motion Affidavits for Shannon, Lane, Melville, paralegal and attorney
10/8/2010	DRB	0.10	25.20	Worked on Motion for Summary Judgment; Reviewed Fanning Affidavit
10/20/2010	DRB	0.10	25.20	Reviewed requirements for Errata sheet and depositions; Reviewed time of receipt of deposition transcripts by Defendants

Date	Employee	Hours	Amount	Description
10/21/2010	DRB	0.30	75.60	Worked on Affidavits of Lane, Melville, paralegal and attorney
10/21/2010	JAC	1.80	453.60	Worked on Attorney Affidavit, Paralegal Affidavit, Union Affidavit, Fund Affidavit and auditor Affidavit on Motion for Summary Judgment
10/22/2010	DRB	0.90	226.80	Communicated with Auditor Shannon regarding calculations on established hours; Worked on motion for summary judgment Affidavits of Lane, Melville, Shannon, paralegal and attorney
10/25/2010	DRB	1.40	352.80	Worked on Affidavits of Melville, Shannon and Lane; Drafted letter to client regarding same; Communicated with Auditor Shannon regarding audit
10/27/2010	DRB	0.70	176.40	Worked on motion for summary judgment and auditor affidavit; Reviewed Federal Rules regarding depositions; Drafted letter to opposing attorney regarding depositions of his clients and Errata sheet
10/28/2010	JLR	1.75	239.75	Communicated regarding audit for the years 2006 through 2010; Prepared spreadsheet and calculated delinquent fringe benefit contributions, interest, and liquidated damages based upon hours for the years 2006 through 2010; Prepared summary spreadsheet itemizing amount due by year

Date	Employee	Hours	Amount	Description
10/28/2010	DRB	1.90	478.80	Worked on motion for summary judgment, Auditor Affidavit, Memorandum of Law and Statement of Material Facts; Conferred regarding request for additional documents
10/29/2010	DRB	0.40	100.80	Worked on Attorney Affidavit and Statement of Material Facts
11/1/2010	DRB	3.20	806.40	Worked on motion for summary judgment: Statement of Material Facts, Memorandum of Law, Notice of Motion, and Attorney Affidavit
11/3/2010	DRB	3.20	806.40	Worked on summary judgment motion: Attorney Affidavit, Paralegal Affidavit, Memorandum of Law and Notice of Motion
11/4/2010	DRB	2.80	705.60	Worked on motion for summary judgment: Memorandum of Law, Statement of Material Facts
11/4/2010	JAC	0.10	25.20	Conferred regarding obtaining discovery and Motion
11/12/2010	DRB	1.10	277.20	Worked on motion for summary judgment: Memorandum of Law Affidavits of Attorney and Paralegal, Notice of Motion, Certificate of Service, and Statement of Material Facts
11/12/2010	JAC	1.55	390.60	Worked on Attorney Affidavit, Statement of Material Facts, Notice of Motion, Certificate of Service, Paralegal Affidavit and Memorandum of Law on Motion for Judgment and Narrative of Legal Services

Date	Employee	Hours	Amount	Description
11/15/2010	DRB	1.50	378.00	Worked on Motion for Summary Judgment: Attorney Affidavit, Memorandum of Law, Statement of Material Facts, Notice of Motion, and Certificate of Service
11/15/2010	JAC	0.20	50.40	Worked on Narrative of Legal Services on Motion for Summary Judgment
11/16/2010	DRB	2.20	554.40	Worked on Motion for Summary Judgment: Attorney Affidavit, Memorandum of Law, Statement of Material Facts, Notice of Motion, and Certificate of Service
12/6/2010	DRB	0.10	25.20	Reviewed court filings
12/6/2010	DRB	0.10	25.20	Drafted and sent correspondence to opposing counsel regarding request for exclusion
12/6/2010	DRB	0.10	25.20	Reviewed Scheduling Order
12/15/2010	DRB	0.50	126.00	Reviewed defendants' Opposition to Motion for Summary Judgment
12/16/2010	DRB	5.40	1,360.80	Drafted Reply to defendants' Opposition to Plaintiffs' Motion for Summary Judgment
12/16/2010	JAC	0.50	126.00	Conferred regarding response to defendant's Opposition to Motion for Summary Judgment, Rule 56 standards for judgment, admissibility of audit and Motions to Strike

Date	Employee	Hours	Amount	Description
12/16/2010	JAC	1.00	252.00	Received and reviewed defendant's Statement of Material Facts, Affidavits in Opposition to Motion for Judgment, Motion to Strike pleadings and drafted comments regarding same and strategy to respond to defendant's contentions
12/16/2010	JAC	0.50	126.00	Researched Rule 56 and Local Court Rules regarding procedures and standards on Motion
12/17/2010	DRB	3.10	781.20	Worked on Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment
12/17/2010	JAC	1.20	302.40	Received and reviewed defendant's Memorandum of Law in Opposition to Summary Judgment; Conferred regarding response and strategy
12/17/2010	JAC	0.70	176.40	Researched 8(f) collective bargaining agreement and scope of construction industry
12/19/2010	DRB	5.60	1,411.20	Worked on Reply brief; Researched and analyzed applicable case law regarding 8(f) Agreements, federal rules of evidence and allowable defenses to action
12/20/2010	DRB	5.75	1,449.00	Worked on Reply Brief, Response to Statement of Material Facts, Affidavits of Larry Shannon and Eugene Melville, all in support of Motion for Summary Judgment

Date	Employee	Hours	Amount	Description
12/20/2010	JAC	1.00	252.00	Conferred regarding reply Memorandum of Law in support of judgment, 8(f) collective bargaining agreement issue and evidentiary issue, bargaining unit work and sand and gravel industry and obtaining Affidavit from Business Manager Melville and Auditor Shannon, and auditor Affidavit in support of Summary Judgment Motion
12/20/2010	JAC	1.25	315.00	Worked on Business Manager Melville's Reply Affidavit in support of Summary Judgment and conferred regarding same; Worked on Reply Memorandum of Law on Motion for Judgment
12/20/2010	BJL	0.50	126.00	Conferred regarding defendants' Motion to Strike
12/20/2010	BJL	0.50	126.00	Reviewed brief and relevant affidavits
12/20/2010	BJL	1.00	252.00	Researched standards on Motion to Strike
12/20/2010	BJL	2.00	504.00	Drafted response to defendants' Motion to Strike Pleadings
12/21/2010	DRB	5.00	1,260.00	Worked on Response to Defendants' Statement of Material Facts and Reply Brief in Support of Motion for Partial Summary Judgment
12/21/2010	JAC	3.50	882.00	Worked on Reply Memorandum of Law on Motion for Summary Judgment and Reply Statement of Material Facts on Motion for Summary Judgment and conferred regarding same

Date	Employee	Hours	Amount	Description
12/21/2010	BJL	1.60	403.20	Drafted portion of reply brief regarding defendants' motion to strike and conducted legal research in connection therewith
12/21/2010	BJL	1.25	315.00	Drafted portion of response to defendants' Statement of Material Facts and conducted legal research in connection therewith
12/22/2010	DRB	5.00	1,260.00	Worked on Response to Defendants' Statement of Material Facts and Memorandum of Law
12/22/2010	JAC	1.05	264.60	Worked on Response to Defendants Statement of Material Facts; Conferred regarding response
12/22/2010	JAC	1.00	252.00	Worked on Reply Memorandum of Law in support of Summary Judgment
12/22/2010	JAC	0.25	63.00	Researched case law concerning interpretation of 8(f) Agreements and Funds' enforcement of same
12/22/2010	BJL	0.20	50.40	Reviewed Federal and local rules regarding Rule 26(a)(3) pretrial disclosures; Conferred regarding same
12/23/2010	JAC	0.10	25.20	Conferred regarding pre-trial disclosure and reviewed Local Rule regarding same
12/23/2010	DRB	1.40	352.80	Worked on Rule 26(a)(3) pre-trial disclosures
12/28/2010	JAC	0.40	100.80	Worked on Funds' pretrial Rule 26(a)(3) disclosures
12/30/2010	DRB	1.00	252.00	Worked on Rule 26(a)(3) disclosures and Motion to Adjourn

Date	Employee	Hours	Amount	Description
12/30/2010	DRB	0.60	151.20	Communicated with former Business Agent Richards regarding Case
1/3/2011	JAC	0.20	52.00	Conferred regarding preparation of oral argument on Motion for Summary Judgment
1/5/2011	DRB	1.60	416.00	Worked on oral argument in support of Motion for Summary Judgment
1/6/2011	DRB	10.90	2,834.00	Prepared for, attended and argued Motion for Summary Judgment in front of Judge Ponsor
1/6/2011	JAC	0.20	52.00	Communicated regarding judge's denial of Summary Judgment Motion and trial date
1/10/2011	JAC	0.20	52.00	Conferred regarding issues in dispute and trial of case
1/10/2011	JAC	0.50	130.00	Conferred regarding trial preparation, joint pre-trial statement, Motion in Limine to preclude defendants' evidence, and evidentiary issues
1/10/2011	JAC	0.10	26.00	Received and reviewed e-mails regarding breakdown of monies due various Funds
1/10/2011	DRB	0.50	130.00	Conferred regarding litigation strategy; Communicated with Witness Jagodowski regarding case; Worked on trial Preparation

Date	Employee	Hours	Amount	Description
1/11/2011	BJL	0.75	195.00	Researched federal and local rules and previous court orders regarding pre-trial procedure; Drafted Attorney Work Product memorandum regarding findings
1/12/2011	DRB	1.00	260.00	Contacted potential Witness Richards regarding trial testimony; Drafted, reviewed and edited Joint Pre-Trial Stipulation, including statement of evidence that will be offered by plaintiffs with respect to liability and damages, proposed statement of undisputed relevant facts and proposed contested issues
1/13/2011	JAC	0.75	195.00	Conferred with attorney for defendants regarding Stipulation to Facts and Exhibits at trial, jury versus nonjury trial, and scope of evidence; Conferred regarding filing a Motion in Limine on issue of nonjury trial and parol evidence to be offered by defendants
1/13/2011	JAC	0.20	52.00	Communicated with Trustee Melville regarding denial of Summary Judgment Motion
1/13/2011	JAC	0.25	65.00	Edited letter to Trustees Melville and Chagnon regarding trial

Date	Employee	Hours	Amount	Description
l/13/2011	DRB	3.30	858.00	Drafted and revised Joint Stipulation; Researched relevant issues of law with supporting authority; Reviewed and analyzed supporting authority; Worked on additional matters to aid in disposition of the case; Drafted and revised listing of proposed exhibits and witnesses; Conferred with potential Witness Doug Richards regarding testimony
1/13/2011	DRB	0.40	104.00	Reviewed and analyzed history of case, pre-hire agreement and obligation to remit contributions
l/14/2011	JAC	0.40	104.00	Reviewed and edited letter to Trustees Melville and Chagnon regarding trial; Conferred regarding same
1/14/2011	DRB	2.50	650.00	Drafted letter to Trustees regarding case; Reviewed and edited Joint Pre-Trial Stipulation, specifically reviewed and edited statement of the evidence that will be offered by plaintiff with respect to liability and damages; Reviewed and analyzed potential documentary evidence and testimony necessary for establishing plaintiffs' claims; Reviewed and edited Joint Stipulation of uncontroverted evidence
1/17/2011	JAC	0.50	130.00	Reviewed file in preparation for conference call with Trustees regarding status of case and trial; Reviewed collective bargaining agreement and Affidavit of Business Manager Melville regarding same

Date	Employee	Hours	Amount	Description
1/17/2011	JAC	0.50	130.00	Conferred with Administrator Lane and Trustees Melville, Callahan, Chagnon, Sullivan, Russo, Chaffee and Lahey regarding trial of case
1/17/2011	JAC	0.70	182.00	Drafted Attorney Work Product memorandum regarding outcome of Board of Trustees' meeting; Drafted Minutes of Board of Trustees' meeting; Conferred regarding Board of Trustees' decision regarding litigation
1/17/2011	BJL	1.50	390.00	Drafted subpoenas for two trial witnesses; Drafted Motion in Limine to exclude defendants' parol evidence concerning alleged oral modification of contract; Conducted research in connection therewith; Conferred regarding same
1/18/2011	DRB	0.25	65.00	Contacted opposing counsel regarding settlement; Reviewed cases with respect to contributions due for each hour worked
1/18/2011	BJL	3.00	780.00	Drafted Motion in Limine to preclude defendants' parol evidence concerning alleged oral modification of contract; Conducted research in connection therewith; Conferred regarding same
1/18/2011	JAC	1.10	286.00	Reviewed defendants' Rule 26 Statement of Witnesses and Exhibits; Edited Joint Pre-Trial Stipulation
1/19/2011	DRB	1.30	338.00	Reviewed and edited Joint Pre-Trial Stipulation; Analyzed issues in connection with trial

Date	Employee	Hours	Amount	Description
1/20/2011	DRB	1.10	286.00	Reviewed and edited Motion in Limine to preclude defendants' evidence; Communicated with Auditor Shannon regarding case; Conferred regarding Motion in Limine to preclude defendants' evidence of alleged oral modification of contract
1/20/2011	BJL	0.30	78.00	Conferred regarding Motion in Limine; Drafted attorney affidavit in support of Motion in Limine to preclude defendants' evidence of alleged oral modification of contract
1/21/2011	DRB	0.25	65.00	Communicated with Administrator Lane regarding audit; Reviewed and edited Motion in Limine to preclude defendants' evidence; Reviewed and edited joint pre-trial statement
1/21/2011	JAC	1.95	507.00	Reviewed and edited Joint Pre-Trial Stipulation; Reviewed and edited Motion in Limine and Memorandum of Law in support of Motion to preclude defendants' evidence of alleged modification of contract; Conferred regarding same
1/24/2011	DRB	2.00	520.00	Reviewed and edited Motion in Limine to preclude defendants' evidence on oral modification of contract and alleged improper motive of Funds; Conferred with Clerk's Office regarding trial Memorandum of Law
1/24/2011	JAC	0.30	78.00	Conferred regarding trial preparation and strategy
1/24/2011	BJL	0.70	182.00	Edited and finalized Jagodowski and Richards subpoenas; Researched cost and procedure for service of subpoenas

Date	Employee	Hours	Amount	Description
1/25/2011	DRB	1.00	260.00	Worked on trial preparation, including editing letters to witnesses and subpoenas
1/25/2011	BJL	0.45	117.00	Finalized Jagodowski and Richards subpoenas and supporting documents; Drafted cover letter to sheriff regarding service of subpoenas; Communicated with sheriff's office to determine fee and procedure
1/25/2011	JAC	0.60	156.00	Edited Notice of Motion and Memorandum of Law on Motion in Limine to preclude defendants' evidence on oral modification of contract and alleged improper motive of Funds
1/26/2011	DRB	1.50	390.00	Communicated with Business Manager Melville regarding litigation; Conferred regarding litigation strategy
1/26/2011	BJL	0.30	78.00	Drafted cover letter to sheriff's office regarding service of subpoenas; Communicated with sheriff's office regarding fee and procedure on service of subpoenas
1/27/2011	DRB	5.00	1,300.00	Reviewed proposed Joint Stipulation and defendants' suggested changes; Communicated with opposing counsel regarding modifications to trial submissions; Revised joint pre-trial submission; Reviewed subpoenas
1/28/2011	DRB	1.00	260.00	Reviewed and edited Motion in Limine to preclude defendants' parol evidence and improper motive evidence; Reviewed and edited Joint Pre-Trial Stipulation

Date	Employee	Hours	Amount	Description
1/28/2011	JAC	1.00	260.00	Conferred regarding trial strategy including witnesses, Exhibits and arguments
2/1/2011	DRB	0.60	156.00	Reviewed and edited Motion in Limine to preclude defendants' evidence of contract modification and improper motive; Reviewed auditor invoices; Communicated with Court Clerk's Office regarding pre-trial conference; Communicated with opposing counsel regarding same
2/2/2011	DRB	0.50	130.00	Drafted outlines of testimony of witnesses at trial
2/3/2011	BJL	0.30	78.00	Reviewed Local Rules regarding deadline for motion response; Conferred regarding same
2/4/2011	KLW	9.60	2,496.00	Prepared for pre-trial conference with Court, attended and appeared at final pre-trial conference before Judge Ponsor
2/7/2011	JLR	0.25	35.25	Communicated regarding trial and Paralegal Affidavit; Updated interest and liquidated damages due for the period January 2005 through October 2010; Drafted Paralegal Affidavit
2/7/2011	BTA	0.50	97.00	Researched the law regarding procedure if subpoena and deposed non-party witness fails to appear at trial under FRCP 32(a)(4)(D)

Date	Employee	Hours	Amount	Description
2/7/2011	DRB	1.50	390.00	Conferred regarding trial and presentation of case, order of witnesses, entering of documentary evidence through witnesses and potential joint witnesses; Communicated with Witness Shannon regarding testimony; Reviewed and edited pre-trial brief
2/7/2011	JAC	0.40	104.00	Conferred regarding outcome of pre-trial conference with Court, Motion in Limine to preclude defendants' evidence, witnesses and strategy
2/7/2011	KLW	2.00	520.00	Conferred regarding strategy in connection with trial; Worked on preparation for trial, including reviewed deposition transcripts and Summary Judgment Motion papers
2/8/2011	BTA	1.10	213.40	Researched the law regarding FRCP 32(a)(4)(D) governing unavailable witnesses and admitting deposition testimony at trial; Drafted memorandum regarding same and interaction with Rule 45(e)
2/8/2011	JAC	0.20	52.00	Conferred regarding personal liability of corporate officer
2/9/2011	BTA	1.00	194.00	Researched the law regarding factors considered by the Court in awarding discretionary attorneys' fees under 29 U.S.C. Section (g)(l); Drafted memorandum regarding same
2/9/2011	JAC	0.25	65.00	Conferred regarding claim against Ray Haluch, attorneys' fees issues, and strategy

Date	Employee	Hours	Amount	Description
2/9/2011	KLW	2.00	520.00	Worked on trial preparation, including liability and damage issues; Reviewed evidence; Prepared e-mail to Trustee Melville regarding trial; Exchanged e-mails with Trustee Melville and set up conference call on February 10, 2011; Reviewed claim for additional audit
2/10/2011	BTA	0.50	97.00	Researched the law regarding questioning opposition's former employee about case; Drafted Attorney Work Product memorandum regarding same
2/10/2011	JAC	1.50	390.00	Conferred regarding issues in dispute, trial preparation, parol evidence, witnesses, contract interpretation, damage calculation, and settlement negotiations
2/10/2011	KLW	1.00	260.00	Communicated with Trustee Melville regarding trial issues; Prepared e-mail to Trustee Chagnon; Worked on issue regarding right to question opposition's former employee; Conferred regarding same; Reviewed Attorney Work Product memorandum regarding same
2/11/2011	DRB	1.00	260.00	Communicated with Martin Jagodowski regarding trial; Reviewed and analyzed response of defendants to Motion in Limine to preclude their evidence; Conferred regarding trial strategy, dropping claim and need to subpoena party witnesses; Reviewed motion procedures

Date	Employee	Hours	Amount	Description
2/11/2011	KLW	1.00	260.00	Received and reviewed electronic case filing notification regarding defendants' opposition to Motion in Limine; Reviewed defendants' opposition papers; Conferred regarding subpoena issues, Jagodowski testimony, and trial preparation items; Worked on trial preparation, including reviewed evidence
2/14/2011	DRB	0.70	182.00	Worked on trial preparation and preparation of exhibits; Drafted correspondence to opposing counsel regarding exhibits; Worked on preparation of Trust Agreements as exhibits; Reviewed and analyzed Trust Agreements with respect to authority under those agreements to collect contributions, obtain attorneys' fees and estimate damages; Drafted correspondence to opposing counsel regarding use of Trust Agreements at trial
2/14/2011	DRB	3.00	780.00	Communicated with Auditor Shannon regarding trial preparation; Reviewed exhibits; Prepared for preparation of Auditor Shannon for trial testimony; Reviewed potential cross-examination topics
2/14/2011	JAC	0.25	65.00	Conferred regarding witnesses and scope of work covered by collective bargaining agreement

Date	Employee	Hours	Amount	Description
2/14/2011	KLW	1.00	260.00	Received and reviewed e-mail from Trustee Chagnon regarding trial issues; Reviewed and edited Rule 41 Stipulation to dismiss action against Ray Haluch; Reviewed deposition transcript of Auditor Shannon; Received and reviewed updated Affidavit of Jessica Ratkowski with attached spreadsheet; Conferred regarding case status and strategy
2/15/2011	DRB	0.20	52.00	Reviewed exhibits and analyzed list of workers for defendants
2/15/2011	DRB	0.20	52.00	Communicated with Doug Richards regarding trial testimony
2/15/2011	KLW	11.00	2,860.00	Preparation of outline of testimony of Administrator Lane and Business Manager Melville; Met with Administrator Lane regarding trial testimony; Met with Business Manager Melville regarding trial testimony; Conferred regarding case status and strategy
2/16/2011	JAC	0.40	104.00	Communicated regarding witness preparation, denial of Motion in Limine, 1st Circuit position regarding parol evidence to vary the terms of a contract

Date	Employee	Hours	Amount	Description
2/16/2011	KLW	7.30	1,898.00	Met with Martin Jagodowski regarding trial testimony; Met with Doug Richards regarding trial testimony; Communicated regarding case status and strategy; Prepared e-mail to Attorney Cahillane forwarding proposed Ratkowski Affidavit and Rule 41 Stipulation to dismiss action against corporate officer; Received and reviewed electronic case filing notification regarding Court's denial without prejudice of plaintiffs' Motion in Limine to preclude defendants' evidence
2/17/2011	JAC	0.40	104.00	Conferred regarding debtor's subpoena, scope of same, compliance with same and quashing same
2/17/2011	DRB	1.00	260.00	Reviewed and prepared exhibits for trial
2/17/2011	DRB	1.00	260.00	Reviewed and analyzed subpoena; Communicated with Administrator Lane and Office Manager Tetreault regarding trial issues
2/17/2011	DRB	0.20	52.00	Contacted Court regarding trial Brief

Date	Employee	Hours	Amount	Description
2/17/2011	KLW	4.50	1,170.00	Received and reviewed trial subpoenas issued by Attorney Cahillane; Conferred regarding response to same, including objections and possible Motion to Quash; Exchanged e-mails and conferred regarding Funds' and Union's ability to satisfy subpoena and gathering sought-after information; Exchanged voicemails with Attorney Cahillane regarding subpoena and other pending trial issues; Reviewed, edited and finalized plaintiffs' trial Brief; Received and reviewed electronic case filing notification regarding filing same; Exchanged e-mails regarding defendants' list of subpoenaed witnesses
2/18/2011	JAC	0.10	26.00	Conferred regarding Central Pension Fund's interest rate, documentation of same and default rate of interest under ERISA
2/18/2011	JAC	0.50	130.00	Conferred regarding stipulation regarding Trustees of Funds, calculation of damages and debtors' position regarding Paralegal Affidavit, determination of damages in absence of a hearing, Central Pension Fund interest rate and calculation of ERISA rate of interest
2/18/2011	JAC	0.25	65.00	Conferred regarding trial techniques, objections and procedure for marking exhibits

Date	Employee	Hours	Amount	Description
2/18/2011	JAC	0.10	26.00	Conferred regarding defendants' trial brief alleging liquidated damages provision of Trust not binding and ERISA's entitlement to double interest and attorneys' fees
2/18/2011	KMH	0.20	28.20	Conferred regarding composition of Funds' Boards of Trustees
2/18/2011	DRB	1.00	260.00	Drafted and sent correspondence to opposing counsel regarding exhibits; Prepared exhibits for trial
2/18/2011	DRB	0.20	52.00	Communicated with Business Manager Melville regarding trial Testimony
2/18/2011	DRB	1.80	468.00	Reviewed and analyzed opposing counsel's trial Brief; Reviewed and analyzed cited case law in connection with Defenses
2/18/2011	KLW	7.50	1,950.00	Worked on trial preparation; Appeared in conference call with Attorney Cahillane regarding subpoena issue, proposed Ratkowski Affidavit, and Stipulation regarding dismissal of claims against Raymond Haluch as individual; Revised Ratkowski Affidavit and prepared e-mail forwarding same to Attorney Cahillane; Reviewed, edited and finalized Stipulation regarding evidence in lieu of producing subpoenaed documents; Prepared e-mail forwarding same to Attorney Cahillane; Exchanged e-mails with Attorney Cahillane regarding approval of draft Stipulation; Received and reviewed e-mail from Attorney Cahillane regarding non-objection to re-

Date	Employee	Hours	Amount	Description
				vised Ratkowski Affidavit; Received and reviewed partially executed Rule 41 Stipulation to dismiss action against corporate officer; Executed same; Received and reviewed electronic case filing notification regarding filing of Rule 41 Stipulation to dismiss action against corporate officer
2/19/2011	KLW	1.20	312.00	Prepared checklist for trial; Reviewed and edited opening Statement
2/20/2011	DRB	1.50	390.00	Researched and analyzed issues in connection with attorneys' fees, Trust Agreements and signatory contractors; Researched and analyzed issues in connection with defendants' defenses regarding National labor Relations Act Section 8(a)(3) and representation status
2/20/2011	DRB	2.30	598.00	Reviewed and analyzed exhibits; Worked on draft and charts of exhibits; Prepared exhibits for trial
2/20/2011	KLW	5.40	1,404.00	Worked on case preparation, including reviewed exhibits; Worked on opening statement; Reviewed trial briefs; Reviewed deposition transcripts
2/21/2011	DRB	0.50	130.00	Worked on documentary evidence to be submitted at trial

Date	Employee	Hours	Amount	Description
2/21/2011	KLW	11.20	2,912.00	Reviewed and organized file for trial; Worked on preparation for trial; Met with Business Manager Melville regarding trial testimony; Reviewed and edited opening statement; Communicated with Martin Jagodowski regarding trial
2/22/2011	JAC	0.25	65.00	Received and reviewed Attorney Work Product memorandum regarding debtors' offer; Conferred regarding attorneys' fees and costs; Drafted Attorney Work Product memorandum regarding offer
2/22/2011	KLW	10.70	2,782.00	Worked on trial preparation, including finalized Melville testimony, reviewed, edited and finalized opening statement, reviewed exhibit list; Reviewed, edited and finalized testimony of Joanne Martins and Raymond Haluch; Reviewed treatise on various evidentiary objections, exhibit admissibility; Appeared in trial on behalf of plaintiffs before Judge Ponsor; Conferred regarding case status and strategy; Reviewed testimony of Auditor Shannon; Received and reviewed electronic case filing notifications regarding trial; Communicated with and exchanged e-mails with Administrator Lane regarding work history exhibit issue
2/23/2011	JAC	0.60	156.00	Communicated regarding outcome of trial, testimony on direct, issues in dispute, and settlement discussions

Date	Employee	Hours	Amount	Description
2/23/2011	JAC	0.20	52.00	Communicated with Administrator Lane regarding trial issue
2/23/2011	JAC	0.25	65.00	Drafted Attorney Work Product memorandum regarding contribution/benefit issues
2/23/2011	KLW	9.40	2,444.00	Prepared for trial; Met with Auditor Shannon regarding trial testimony; Met with Administrator Lane regarding trial testimony; Met with Business Manager Melville regarding trial testimony; Appeared in trial on behalf of plaintiffs; Communicated with Attorney Cahillane regarding defendants' settlement offer; Communicated regarding case status and strategy; Received and reviewed electronic case filing notifications regarding trial status, defendants' Rule 52 Motion for Judgment as matter of law; Conferred regarding case status and strategy; Received and reviewed e-mail regarding strategy
2/24/2011	JLR	0.20	28.20	Communicated regarding recalculation of delinquency pursuant to the Court's request
2/24/2011	JLR	1.50	211 .50	Prepared spreadsheets and recalculated the delinquency based upon Employee Jagodowski's hours at seventy-five percent of the unreported hours; Discussed the same
2/24/2011	DRB	0.70	182.00	Worked on rebuttal witness issue and Paralegal Affidavit

Date	Employee	Hours	Amount	Description
2/24/2011	JAC	0.75	195.00	Conferred regarding trial strategy, evidence, rebuttal evidence, damages and oral modification issue
2/24/2011	JAC	0.10	26.00	Communicated with Administrator Lane regarding trial issue
2/24/2011	KLW	2.00	520.00	Reviewed and edited spreadsheets concerning damages calculations; Reviewed file in connection with possible rebuttal case and response to defendants' case
2/25/2011	JLR	0.50	70.50	Drafted and edited required settlement documents
2/25/2011	LLD	1.50	211.50	Conducted search of Massachusetts, Vermont, Delaware, and Connecticut Secretary of State Division of Corporations concerning Haluch corporations
2/25/2011	JAC	0.25	65.00	Conferred regarding debtors and damages
2/25/2011	JAC	1.20	312.00	Communicated with Board of Trustees regarding trial
2/25/2011	JAC	0.25	65.00	Communicated regarding strategy and Board of Trustees' position
2/25/2011	JAC	0.60	156.00	Drafted, reviewed and revised required settlement documents
2/25/2011	JAC	0.10	26.00	Conferred regarding required Paralegal Affidavit

Date	Employee	Hours	Amount	Description
2/25/2011	KLW	3.00	780.00	Prepared for conference call with Board of Trustees; Received and reviewed e-mail from Attorney Cahillane regarding settlement offer and prepared reply e-mail; Communicated regarding case status; Appeared in conference call with Board of Trustees regarding case; Received and reviewed telephone message from Attorney Cahillane and presented counter-offer; Reviewed, edited and fmalized revised Affidavit of Jessica L. Ratkowski; Reviewed and edited spreadsheets, attached as exhibits; Worked on preparation for trial, including considered possible rebuttal witnesses; Communicated with Business Manager Melville regarding same; Received and reviewed faxed documents from Union in connection with same
2/27/2011	DRB	0.50	130.00	Prepared exhibits for trial
2/27/2011	KLW	6.00	1,560.00	Worked on and organized file in connection with trial preparation; Reviewed transcripts of depositions of Todd Downey and Raymond Haluch; Reviewed and edited closing argument; Reviewed cases regarding section 8(f) argument; Prepared parol evidence objection; Conferred regarding case status and strategy

Date	Employee	Hours	Amount	Description
2/28/2011	KLW	9.40	2,444.00	Prepared for and attended trial, including reviewed and edited closing argument, reviewed testimony of Joanne Martin, Prepared for cross-examination of Todd Downey, prepared for cross-examination of Raymond Haluch; Appeared in trial on behalf of plaintiffs; Communicated with Trustee Melville, Trustee Chagnon regarding trial issue; Communicated with Court Reporter Alice Moran regarding purchase of transcript and prepared e-mail confirming same
3/1/2011	DRB	0.20	52.00	Communicated with Administrator Lane regarding trial
3/2/2011	KLW	0.25	65.00	Exchanged several e-mails with Court Reporter regarding transcript of trial; Received and reviewed electronic case filing notifications regarding filing of transcript
3/2/2011	KLW	1.20	312.00	Drafted proposed findings of fact
3/3/2011	KLW	0.50	130.00	Received and reviewed trial transcript
3/4/2011	KLW	0.70	182.00	Exchanged several e-mails with Court Reporter; Received and reviewed trial transcripts for February 22 and 23, 2011; Received and reviewed electronic case filing notifications regarding same
3/4/2011	KLW	1.10	286.00	Drafted Proposed Findings of Fact and Conclusions of Law

Date	Employee	Hours	Amount	Description
3/7/2011	KLW	0.45	117.00	Reviewed trial transcripts
3/8/2011	DRB	0.20	52.00	Communicated with Court Clerk regarding extension of time to file request for attorneys' fees
3/8/2011	DRB	0.40	104.00	Drafted motion to extend time to request attorneys' fees
3/8/2011	DRB	0.20	52.00	Drafted correspondence to opposing counsel regarding extension of time to request attorneys' fees
3/8/2011	DRB	0.50	130.00	Researched and analyzed local rules regarding time to request fees and time to file motion for fees
3/8/2011	JAC	0.20	52.00	Conferred regarding accounting of attorneys' fees and costs in support of an award of damages
3/8/2011	JAC	0.20	52.00	Conferred regarding Findings of Fact and Conclusion of Law and procedure and reviewed proposed Findings of Fact and Conclusion of Law format
3/8/2011	KLW	2.20	572.00	Reviewed Court's rules, trial transcript, and file documents; Edited and finalized motion to extend time to submit petition for attorneys' fees; Received and reviewed electronic case filing notification regarding same
3/8/2011	KLW	1.40	364.00	Edited proposed findings of fact and conclusions of law
3/9/2011	KLW	0.60	156.00	Reviewed trial transcripts

Date	Employee	Hours	Amount	Description
3/9/2011	KLW	1.40	364.00	Edited proposed findings of fact and conclusions of law
3/10/2011	DRB	0.20	52.00	Contacted Court regarding motion for extension of time; Conferred regarding same
3/10/2011	KLW	1.80	468.00	Edited proposed findings of fact and conclusions of law
3/11/2011	KLW	0.40	104.00	Conferred regarding case status, preparation of affidavit and motion to extend time; Received and reviewed electronic case filing notification regarding same
3/11/2011	DRB	0.30	78.00	Communicated with Court regarding extension of time; Conferred regarding same
3/13/2011	KLW	3.80	988.00	Edited proposed findings of fact and conclusions of law
3/13/2011	KLW	0.40	104.00	Drafted supporting post-trial brief
3/14/2011	KLW	4.80	1,248.00	Edited and finalized proposed findings of fact and conclusions of law
3/14/2011	KLW	2.80	728.00	Edited and finalized brief in support of proposed findings of fact and conclusions of law
3/14/2011	KLW	0.20	52.00	Received and reviewed electronic case filing notifications regarding plaintiffs' findings and defendants' findings
3/14/2011	KLW	0.20	52.00	Conferred regarding defendants' post-trial submission

Date	Employee	Hours	Amount	Description
3/15/2011	KLW	0.50	130.00	Reviewed defendants' proposed findings of fact and conclusions of law and supporting memorandum
3/24/2011	JAC	0.25	65.00	Conferred regarding lodestar rate in Massachusetts and obtaining Affidavit from practicing attorneys
3/25/2011	DRB	0.20	52.00	Communicated with Witness Richards regarding the conclusion of the trial and subpoena issue
3/30/2011	KLW	0.25	65.00	Communicated with Attorney Peter Janus regarding lodestar rate
3/31/2011	KLW	0.25	65.00	Exchanged multiple e-mails with Attorney Janus regarding attorneys' fees rate issue
Total Fees		**337.05**	**$126,912.30**	

1.90	Attorney hours @ $235.00 per hour =	$ 446.50	(2008)
1.90		$ 446.50	
33.20	Attorney hours @ $247.00 per hour =	$ 8,200.40	(2009)
0.85	Paralegal hours @ $134.00 per hour =	$ 113.90	(2009)
34.05		$ 8,314.30	
245.60	Attorney hours @ $252.00 per hour = Paralegal hours	$ 61,891.20	(2010)
1.75	@ $137.00 per hour =	$ 239.75	(2010)
247.35		$ 62,130.95	
210.90	Attorney hours @ $260.00 per hour =	$ 54,834.00	(2011)
3.10	Jr. Assoc. hours @ @ 194.00 per hour =	$ 601.40	(2011)
4.15	Paralegal hours @ $141.00 per hour =	$ 585.15	(2011)
218.15		$ 56,020.55	
	Total Fees	**$126,912.30**	

Costs		
Business Meals		439.64
Copying		1,104.50
Filing Fees		500.00
Mileage		2,239.82
Postal Service		23.52
Service of Process		270.90
Stenographic Record		1,054.65
Facsimile Charges		88.50
Travel Expense		1,205.61
Witness Expense		156.00
Computer Research		2,977.30
Copy Impressions		90.70
Total Costs		**$10,151.14**
Matter Totals	**337.05**	**$137,063.44**

Blitman & King LLP Cost Listing Transactions thru Mar 31, 2011
Report Run 4/1/2011 10:56AM By: JULIENNE A. SCARAVILLO

Client / Matter IUOE 98 FRINGE BENEFIT FUNDS COLLECTIONS / RAY HALUCH SAND & GRAVEL (4995/19377)**

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
COPYING								
12/15/2008	JLP	Cost	Billed	3.00	0.20	0.60	Copying	final prntd ltr to Haluch
12/15/2008	JLP	Cost	Billed	18.00	0.20	3.60	Copying	pc ltr to Haluch
	Subtotal 2008:			**21.00**		**$4.20**		
1/15/2009	DRB	Cost	Billed	4.00	0.20	0.80	Copying	email from auditor
4/13/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re audit appointment
4/16/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re audit
4/16/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	fax success receipt
4/16/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane re audit
4/21/2009	DRB	Cost	Billed	2.00	0.20	0.40	Copying	copy of fax letter from opp counsel

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
4/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final letter to atty cahillane re audit disclosure
4/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy letter to atty cahillane re audit disclosure
4/28/2009	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc of letter to atty cahillane re audit disclosure
4/30/2009	JAS	Cost	Billed	15.00	0.20	3.00	Copying	2006 2010 cba
6/23/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re todd downey reported hours
7/27/2009	DRB	Cost	Billed	5.00	0.20	1.00	Copying	spreadsheet for downey hours
7/31/2009	IDM	Cost	Billed	12.00	0.20	2.40	Copying	letter to attorney cahillane
7/31/2009	JLR	Cost	Billed	6.00	0.20	1.20	Copying	pnt audit sheets
8/21/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to attorney cahillane
8/21/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	cc ltr to attorney cahillane
8/24/2009	DRB	Cost	Billed	2.00	0.20	0.40	Copying	corporation description
8/25/2009	DRB	Cost	Billed	2.00	0.20	0.40	Copying	corporation description
8/26/2009	DRB	Cost	Billed	1.00	0.20	0.20	Copying	corporation description
8/26/2009	DRB	Cost	Billed	3.00	0.20	0.60	Copying	revised audit

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
8/27/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr ludlow town clerk requesting dba certificates
8/27/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy ltr ludlow town clerk requesting dba certificates
8/31/2009	DRB	Cost	Billed	4.00	0.20	0.80	Copying	company info
9/212009	JLR	Cost	Billed	7.00	0.20	1.40	Copying	pnt ssheets based upon revised audit of 82609
9/8/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr atty cahillane requesting providing records
9/8/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	fax success report
9/8/2009	JAS	Cost	Billed	7.00	0.20	1.40	Copying	cc ltr atty cahillane requesting providing records
9/10/2009	DRB	Cost	Billed	7.00	0.20	1.40	Copying	labor agreement
9/23/2009	JAS	Cost	Billed	19.00	0.20	3.80	Copying	final complaint
9/25/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final process server letter
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to secretary of labor
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to secretary of labor
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to secretary of treasury

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to secretary of treasury
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy letter to sheriff for service
9/28/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
9/28/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	general order
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
9/28/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
9/28/2009	JAS	Cost	Billed	76.00	0.20	15.20	Copying	copy of complaint to go with summons for process
9/28/2009	JAS	Cost	Billed	44.00	0.20	8.80	Copying	summons and complaint
9/28/2009	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc letter to sheriff for service
9/28/2009	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc letter to secretary of treasury
9/28/2009	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc letter to secretary of labor
9/28/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy letter to sheriff for service
10/14/2009	LMF	Cost	Billed	1.00	0.20	0.20	Copying	ecf filing receipt

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
10/14/2009	LMF	Cost	Billed	1.00	0.20	0.20	Copying	ecf filing receipt
10/14/2009	LMF	Cost	Billed	1.00	0.20	0.20	Copying	ecf filing receipt
10/19/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	notice of electronic filing
10/19/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
10/21/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final stipulation to extend time
10/22/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	notice of electronic filing
10/29/2009	DRB	Cost	Billed	3.00	0.20	0.60	Copying	defendants answer
10/29/2009	DRB	Cost	Billed	3.00	0.20	0.60	Copying	defendants answer
10/29/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
10/29/2009	LLD	Cost	Billed	7.00	0.20	1.40	Copying	printed updated unpaid feb 05 to nov 08 Spreadsheets
10/30/2009	JAS	Cost	Billed	19.00	0.20	3.80	Copying	executed complaint
11/2/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re settlement
11/2/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane re settlement
11/2/2009	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane re audit
11/2/2009	JAS	Cost	Billed	7.00	0.20	1.40	Copying	spreadsheets for atty cahillane
11/23/2009	JAS	Cost	Billed	4.00	0.20	0.80	Copying	joint statement

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
11/23/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy ltr to atty cahillane with joint statement
11/23/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	cc ltr to atty cahillane with joint statement
11/30/2009	JLR	Cost	Billed	2.00	0.20	0.40	Copying	pnt notice of sched conf.
11/30/2009	JLR	Cost	Billed	2.00	0.20	0.40	Copying	pnt emecf notice of sched conf. doc 14
12/10/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re joint statement
12/21/2009	JLR	Cost	Billed	7.00	0.20	1.40	Copying	pnt updated spreadsheets for frcp 26 stmt
12/23/2009	DRB	Cost	Billed	3.00	0.20	0.60	Copying	email chain re audit
12/30/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re rule 16 joint statement
12/30/2009	JAS	Cost	Billed	4.00	0.20	0.80	Copying	proposed joint statement
12/30/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane re joint statement
12/30/2009	JAS	Cost	Billed	1.00	0.20	0.20	Copying	notice of electronic filing
12/30/2009	JAS	Cost	Billed	8.00	0.20	1.60	Copying	cc ltr to atty cahillane re joint statement
12/30/2009	JAS	Cost	Billed	2.00	0.20	0.40	Copying	total hours of downey rental

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
		Subtotal		**375.00**		**$75.00**		
1/6/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	attachment to notice to take deposition
1/6/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	final plaintiffs disclosures
1/6/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane with disclosures
1/6/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final notice to take frcp rule deposition
1/6/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final deposition notice attachment
1/6/2010	JAS	Cost	Billed	10.00	0.20	2.00	Copying	final plaintiffs first request for production of documents
1/6/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	final plaintiffs first request for admissions
1/6/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re production of documents
1/6/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane with disclosures
1/6/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	plaintiffs disclosures

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
1/6/2010	JAS	Cost	Billed	19.00	0.20	3.80	Copying	final plaintiffs first request for admissions
1/6/2010	JAS	Cost	Billed	10.00	0.20	2.00	Copying	final plaintiffs first request for production of documents
1/6/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	final notice to take frcp rule deposition
1/6/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final notice of deposition
1/6/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	cc ltr to atty cahillane re production of documents
1/11/2010	DRB	Cost	Billed	3.00	0.20	0.60	Copying	scheduling order
1/11/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final deposition notice for martin Jagodowski
1/13/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to atty cahillane re deposition notice for Jagodowski
1/13/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy ltr atty cahillane re deposition notice for Jagodowski
1/13/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	cc ltr atty cahillane re deposition notice for Jagodowski

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
1/14/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to sheriff re service of subpoena on downey Reprint
1/14/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to sheriff re service of subpoena on Downey
1/14/2010	JAS	Cost	Billed	31.00	0.20	6.20	Copying	downey subpoena
1/14/2010	JAS	Cost	Billed	8.00	0.20	1.60	Copying	cc ltr to sheriff re service of subpoena on downey
1/19/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	draft memo to file re county of residence of todd downey
2/11/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	agreement with haluch and iuoe
2/12/2010	JLR	Cost	Billed	1.00	0.20	0.20	Copying	print final memo to drb re attempt to term cba
2/12/2010	JLR	Cost	Billed	3.00	0.20	0.60	Copying	pc memo to drb and cba term ltr
2/18/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	todd down deposition questions
2/18/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	joanne martins deposition questions
2/18/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	ray haluch deposition questions
2/19/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re jagodowski subpoena

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/19/2010	JAS	Cost	Billed	30.00	0.20	6.00	Copying	work invoices
2/19/2010	JAS	Cost	Billed	21.00	0.20	4.20	Copying	documents with ray haluchs signature
2/19/2010	JAS	Cost	Billed	24.00	0.20	4.80	Copying	agreement with haluch and iuoe
2/22/2010	DRB	Cost	Billed	3.00	0.20	0.60	Copying	spreadsheet re contributions
2/22/2010	DRB	Cost	Billed	1.00	0.20	0.20	Copying	spreadsheet re contributions
2/22/2010	DRB	Cost	Billed	2.00	0.20	0.40	Copying	spreadsheet re contributions
2/22/2010	DRB	Cost	Billed	1.00	0.20	0.20	Copying	spreadsheet re contributions
2/22/2010	DRB	Cost	Billed	7.00	0.20	1.40	Copying	spreadsheet re contributions
2/22/2010	JAS	Cost	Billed	42.00	0.20	8.40	Copying	work performance invoices
2/25/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to todd downey re re-scheduling deposition
2/25/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to todd downey re re-scheduling deposition Reprint
2/25/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy ltr to todd downey re rescheduling deposition
2/25/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	cc ltr to todd downey re re-scheduling deposition

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/26/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re responses
2/26/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re conversation with downey
2/26/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane re response
2/26/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane re response
3/10/2010	DRB	Cost	Billed	2.00	0.20	0.40	Copying	copy of rule 16 schedule
3/15/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re possible settlement
3/15/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re possible settlement reprint
3/15/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to atty cahillane re possible settlement reprint
3/15/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane re possible settlement
3/15/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane re possible settlement
3/17/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane re follow up

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
3/19/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	final ltr to atty cahillane re amending responses
3/19/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	final ltr to atty cahillane re amending responses reprint
3/19/2010	LMF	Cost	Billed	9.00	0.20	1.80	Copying	cahillane letter copies
3/29/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	draft memo to file re discovery requests
3/31/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr atty cahillane re response documents
4/1/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re response
4/1/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane re response
4/8/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	updated spreadsheet
4/8/2010	JAS	Cost	Billed	8.00	0.20	1.60	Copying	updated spreadsheet
4/8/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	updated spreadsheet
4/8/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re cahillane possible withdrawal
4/12/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr atty cahillane re depositions reprint

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
4/12/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr atty cahillane re depositions
4/12/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr atty cahillane re depositions
4/14/2010	DRB	Cost	Billed	1.00	0.20	0.20	Copying	motion to withdraw
4/14/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to judge neiman re cahillane withdrawing as Atty
4/14/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
4/14/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to judge neiman re cahillane withdrawing as atty
4/19/2010	DRB	Cost	Billed	2.00	0.20	0.40	Copying	motion hearing date in ray Haluch
4/21/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr atty cahillane re abiding by cba reprint
4/21/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr atty cahillane re abiding by cba reprint
4/30/2010	IDM	Cost	Billed	2.00	0.20	0.40	Copying	final letter
4/30/2010	IDM	Cost	Billed	8.00	0.20	1.60	Copying	final letter
4/30/2010	IDM	Cost	Billed	2.00	0.20	0.40	Copying	final letter
4/30/2010	IDM	Cost	Billed	1.00	0.20	0.20	Copying	fax cover sheet
4/30/2010	IDM	Cost	Billed	6.00	0.20	1.20	Copying	letter copies to cahillane

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
5/7/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re discovery requests Subpoena
5/7/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	driving directions to estimate witness fee
5/7/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re conversation with Jagodowski
5/7/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	rule 45 for subpoena
5/13/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	docket report
5/19/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re compliance
5/19/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane re compliance reprint
5/19/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane re compliance reprint
5/24/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re document review
5/24/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane re document review
5/24/2010	JAS	Cost	Billed	10.00	0.20	2.00	Copying	first request for prod of docs

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
5/24/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	cc ltr to atty cahillane re document review
5/28/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	draft memo to file re review of documents date
6/1/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	martin jagodowski deposition questions
6/2/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	draft memo to file re inspection of records
6/2/2010	JAS	Cost	Billed	5.00	0.20	1.00	Copying	draft deposition questions for ray Haluch
6/3/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	draft todd downey deposition questions
6/7/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re document availability
6/7/2010	JAS	Cost	Billed	7.00	0.20	1.40	Copying	updated spreadsheet
6/7/2010	JAS	Cost	Billed	8.00	0.20	1.60	Copying	updated spreadsheet
6/8/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr todd downey re deposition
6/8/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr martin jagodowski re deposition

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
6/8/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr martin jagodowski re deposition
6/8/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr todd downey re deposition
6/8/2010	JAS	Cost	Billed	8.00	0.20	1.60	Copying	cc ltr todd downey re deposition
6/8/2010	JAS	Cost	Billed	8.00	0.20	1.60	Copying	cc ltr martin jagodowski re deposition
6/10/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	further scheduling order cover page
6/14/2010	JAS	Cost	Billed	73.00	0.20	14.60	Copying	docs for depositions
6/18/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re haluch deposition
6/18/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr judge neiman re individual tax returns reprint
6/18/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re downey delinquency
6/18/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr atty cahillane re haluch deposition
6/18/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	notice of electronic filing

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
6/18/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr atty cahillane re haluch deposition
6/18/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	final ltr judge neiman re individual tax returns
6/24/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	memo to file re discussion with jac re tax records
6/24/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr atty cahillane re shannon deposition
6/24/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr atty cahillane re shannon deposition
6/24/2010	JAS	Cost	Billed	8.00	0.20	1.60	Copying	cc ltr atty cahillane re shannon deposition
6/29/2010	JAS	Cost	Billed	10.00	0.20	2.00	Copying	cc ltr to judge hillman re mediation
6/30/2010	JLR	Cost	Billed	1.00	0.20	0.20	Copying	pnt email from barb
7/1/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	document summary of jagodowski deposition
7/1/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	document summary of downey deposition

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
7/1/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr atty cahillane re disclosures
7/1/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr atty cahillane re disclosures.
7/1/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr atty cahillane re disclosures
7/19/2010	JLR	Cost	Billed	1.00	0.20	0.20	Copying	pnt email from barb
7/20/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane re august depositions
7/20/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane re august depositions
7/29/2010	JAS	Cost	Billed	12.00	0.20	2.40	Copying	central pension fund trust agmt for discovery
7/29/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to reporter re shannon deposition
7/29/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	fax success receipt
7/29/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	fax success receipt
7/29/2010	JAS	Cost	Billed	60.00	0.20	12.00	Copying	pension fund trust agmt for discovery
7/29/2010	JAS	Cost	Billed	56.00	0.20	11.20	Copying	welfare fund trust agmt for discovery

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
7/29/2010	JAS	Cost	Billed	49.00	0.20	9.80	Copying	training fund trust agmt for discovery
7/29/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	cc ltr to reporter re shannon deposition
7/29/2010	JAS	Cost	Billed	58.00	0.20	11.60	Copying	annuity fund trust agmt for discovery
7/30/2010	JAS	Cost	Billed	13.00	0.50	6.50	Copying	exhibits for discovery [color copy]
7/30/2010	JAS	Cost	Billed	9.00	0.50	4.50	Copying	exhibits for discovery [color copy]
7/30/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibits for discovery
7/30/2010	JAS	Cost	Billed	13.00	0.50	6.50	Copying	exhibits for discovery [color copy]
7/30/2010	JAS	Cost	Billed	26.00	0.20	5.20	Copying	exhibits for discovery
7/30/2010	JAS	Cost	Billed	24.00	0.20	4.80	Copying	exhibits for discovery
7/30/2010	JAS	Cost	Billed	9.00	0.20	1.80	Copying	exhibits for discovery
8/9/2010	MGT	Cost	Billed	9.00	0.20	1.80	Copying	Annual Report 2005
8/9/2010	MGT	Cost	Billed	9.00	0.20	1.80	Copying	Annual Report 2006
8/9/2010	MGT	Cost	Billed	12.00	0.20	2.40	Copying	Annual Report 2009
8/9/2010	MGT	Cost	Billed	3.00	0.20	0.60	Copying	Annual Report 2010
8/9/2010	MGT	Cost	Billed	3.00	0.20	0.60	Copying	2006 1099 Hulch
8/9/2010	MGT	Cost	Billed	12.00	0.20	2.40	Copying	2006 1099 Hulch

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
8/11/2010	JAS	Cost	Billed	9.00	0.20	1.80	Copying	work hours report
8/11/2010	JAS	Cost	Billed	13.00	0.20	2.60	Copying	work hours report
8/11/2010	JAS	Cost	Billed	9.00	0.20	1.80	Copying	work hours report
8/12/2010	JAS	Cost	Billed	16.00	0.20	3.20	Copying	remittance reports
8/12/2010	JAS	Cost	Billed	12.00	0.20	2.40	Copying	remittance reports
8/12/2010	JAS	Cost	Billed	16.00	0.20	3.20	Copying	remittance reports
8/12/2010	JAS	Cost	Billed	12.00	0.20	2.40	Copying	remittance reports
8/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	cover sheet for document production
8/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	cover sheet for document production
8/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	cover sheet for document production
8/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	cover sheet for document production
8/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	cover sheet for document production
8/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	cover sheet for document production

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
8/16/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty callihane with requested documents
8/16/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	cc letter atty cahillane
8/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	page of docs for atty cahillane
8/16/2010	JAS	Cost	Billed	182.00	0.20	36.40	Copying	docs for atty cahillane
8/16/2010	JAS	Cost	Billed	148.00	0.20	29.60	Copying	docs for atty cahillane
8/16/2010	JAS	Cost	Billed	10.00	0.50	5.00	Copying	docs for atty cahillane [color copy]
8/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	page of docs for atty cahillane
8/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	page of docs for atty cahillane
9/1/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to atty cahillane with requested documents
9/1/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane with requested documents
9/1/2010	JAS	Cost	Billed	34.00	0.20	6.80	Copying	documents for atty cahillane
9/1/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane with requested documents
9/3/2010	JAS	Cost	Billed	7.00	0.20	1.40	Copying	docket report from pacer
9/8/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	revised spreadsheet

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
9/8/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	revised spreadsheet
9/8/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	revised spreadsheet summary page
9/14/2010	JAS	Cost	Billed	8.00	0.20	1.60	Copying	updated spreadsheet
9/14/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	exhibit b to drb aff for summ judgment
9/14/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	exhibit a to shannon affidavit
9/14/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	exhibit a to melville affidavit
9/14/2010	JAS	Cost	Billed	24.00	0.20	4.80	Copying	exhibit b to melville affidavit
9/14/2010	JAS	Cost	Billed	19.00	0.20	3.80	Copying	exhibit c to drb affidavit
9/14/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	exhibit a to drb aff for summ judgment
9/20/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	draft memo to file re raymond haluch deposition
10/1/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	legal research
10/4/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	final ltr to fanning with affidavit
10/4/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	file copies ltr fanning and aft
10/4/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	file copies ltr fanning and aff

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
10/25/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy ltr to melville with affidavit
10/25/2010	JAS	Cost	Billed	7.00	0.20	1.40	Copying	file copy melville aff for summary judgment
10/25/2010	JAS	Cost	Billed	12.00	0.20	2.40	Copying	file copy lane aff for summary judgment
10/28/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	condon spreadsheet
10/28/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	summary spreadsheet
10/28/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	todd downey spreadsheet
10/28/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	jagodowski spreadsheet
10/28/2010	JLR	Cost	Billed	6.00	0.20	1.20	Copying	print john doe spreadsheet for 06-10
10/28/2010	JLR	Cost	Billed	1.00	0.20	0.20	Copying	print john doe summary spreadsheet for 06-10
10/28/2010	JLR	Cost	Billed	6.00	0.20	1.20	Copying	print john doe spreadsheet for 06-10
10/29/2010	JAS	Cost	Billed	36.00	0.20	7.20	Copying	jagodowski depo transcript
10/29/2010	JAS	Cost	Billed	24.00	0.20	4.80	Copying	martins depo transcript
10/29/2010	JAS	Cost	Billed	48.00	0.20	9.60	Copying	haluch depo transcript

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
10/29/2010	JAS	Cost	Billed	81.00	0.20	16.20	Copying	downey depo transcript
11/4/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	file copy ltr to atty cahillane re transcripts
11/4/2010	JAS	Cost	Billed	4.00	0.20	0.80	Copying	cc ltr to atty cahillane re transcripts
11/15/2010	JLR	Cost	Billed	7.00	0.20	1.40	Copying	print revised john doe spreadsheets
11/15/2010	JLR	Cost	Billed	6.00	0.20	1.20	Copying	print revised spreadsheets for exh a
11/15/2010	JLR	Cost	Billed	5.00	0.20	1.00	Copying	print final jlr affidavit for motion
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibit tab
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibit tab
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibit tab
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibit tab
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibit tab
11/16/2010	JAS	Cost	Billed	23.00	0.20	4.60	Copying	final mol in support of motion for summary judgment
11/16/2010	JAS	Cost	Billed	7.00	0.20	1.40	Copying	final statement of material facts

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	cos for summary judgment documents
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibit tab
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibit tab
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibit tab
11/16/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	exhibit tab
11/16/2010	JAS	Cost	Billed	10.00	0.20	2.00	Copying	final drb aff support of motion for summary judgment
11/16/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	cos for summary judgment documents
11/16/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	notice of electronic filing
11/16/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
11/16/2010	JAS	Cost	Billed	3.00	0.20	0.60	Copying	exhibit a to shannon aff
11/16/2010	JAS	Cost	Billed	11.00	0.20	2.20	Copying	exhibits to jlr affidavit
11/30/2010	LLD	Cost	Billed	1.00	0.20	0.20	Copying	cm ecf email re hearing on motion for part summary judgment
12/16/2010	LLD	Cost	Billed	32.00	0.20	6.40	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	2.00	0.20	0.40	Copying	cm ecf email re motion to strike

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
12/16/2010	LLD	Cost	Billed	6.00	0.20	1.20	Copying	cm ecf email attachment motion to strike
12/16/2010	LLD	Cost	Billed	2.00	0.20	0.40	Copying	cm ecf email attachment opposition to motion for sj
12/16/2010	LLD	Cost	Billed	6.00	0.20	1.20	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	2.00	0.20	0.40	Copying	cm ecf email re statement of material facts
12/16/2010	LLD	Cost	Billed	2.00	0.20	0.40	Copying	cm ecf email re opposition to motion for sj
12/16/2010	LLD	Cost	Billed	7.00	0.20	1.40	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	21.00	0.20	4.20	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	1.00	0.20	0.20	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	3.00	0.20	0.60	Copying	cm ecf email re brief in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	2.00	0.20	0.40	Copying	cm ecf email attachment motion in opposition to motion for sj

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
12/16/2010	LLD	Cost	Billed	2.00	0.20	0.40	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	21.00	0.20	4.20	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	9.00	0.20	1.80	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	13.00	0.20	2.60	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	1.00	0.20	0.20	Copying	cm ecf email attachment motion in opposition to motion for sj
12/16/2010	LLD	Cost	Billed	6.00	0.20	1.20	Copying	cm ecf email attachment statement of material facts
12/21/2010	JAS	Cost	Billed	1.00	0.20	0.20	Copying	notice of electronic filing
12/21/2010	JAS	Cost	Billed	6.00	0.20	1.20	Copying	cc ltr to judge ponsor re adjournment request
12/30/2010	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
	Subtotal 2010:			**2049.00**		**$423.30**		
1/3/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy letter to atty cahillane re disclosures
1/3/2011	JAS	Cost	Billed	7.00	0.20	1.40	Copying	final disclosures

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
1/3/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to atty cahillane with disclosures
1/3/2011	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
1/3/2011	JAS	Cost	Billed	7.00	0.20	1.40	Copying	plaintiffs disclosures
1/3/2011	JAS	Cost	Billed	2.00	0.20	0.40	Copying	cc letter to atty cahillane re disclosures
1/13/2011	JLR	Cost	Billed	1.00	0.20	0.20	Copying	pnt email re conference call
1/14/2011	JAS	Cost	Billed	4.00	0.20	0.80	Copying	final ltr melville and chagnon re trial
1/14/2011	JAS	Cost	Billed	8.00	0.20	1.60	Copying	file copy ltr melville and chagnon re trial
1/14/2011	JAS	Cost	Billed	4.00	0.20	0.80	Copying	dup original final ltr melville and chagnon re trial
1/14/2011	JLR	Cost	Billed	1.00	0.20	0.20	Copying	pnt conference call info email
1/18/2011	JLR	Cost	Billed	2.00	0.20	0.40	Copying	pc memo to drb re bot conf call
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to jagodowski re trial
1/25/2011	JAS	Cost	Billed	14.00	0.20	2.80	Copying	file copy melville affidavit for trial preparation
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy ltr to jagodowski re trial

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
1/25/2011	JAS	Cost	Billed	5.00	0.20	1.00	Copying	file copy shannon affidavit for trial preparation
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy ltr to doug richards re trial
1/25/2011	JAS	Cost	Billed	2.00	0.20	0.40	Copying	notice of electronic filing
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy ltr to sheriff re service of subpoena
1/25/2011	JAS	Cost	Billed	3.00	0.20	0.60	Copying	shannon reply aff for review for trial prep
1/25/2011	JAS	Cost	Billed	101.00	0.20	20.20	Copying	lane aff for partial sj for review for trial prep
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to mitty re trial preparation
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to sheriff re service of subpoena
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to barb lane re trial preparation
1/25/2011	JAS	Cost	Billed	11.00	0.20	2.20	Copying	file copy lane affidavit for trial preparation

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy melville ltr re prep for trial
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to doug richards re trial
1/25/2011	JAS	Cost	Billed	3.00	0.20	0.60	Copying	melville reply aff for review for trial prep
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	final ltr to bill shannon re trial preparation
1/25/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy lane ltr re prep for trial
1/25/2011	JAS	Cost	Billed	7.00	0.20	1.40	Copying	subpoena and frcp
1/26/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	letter sheriff re doug richards subpoena
1/26/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy letter sheriff re doug richards subpoena
1/26/2011	JAS	Cost	Billed	7.00	0.20	1.40	Copying	richards subpoena
1/26/2011	LMF	Cost	Billed	2.00	0.20	0.40	Copying	cert of service
1/27/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	duplicate file copy ltr to atty cahillane with subpoenas
1/27/2011	JAS	Cost	Billed	1.00	0.20	0.20	Copying	file copy ltr to atty cahillane with subpoenas
1/27/2011	JAS	Cost	Billed	4.00	0.20	0.80	Copying	attachment to subpoenas

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
1/27/2011	JAS	Cost	Billed	20.00	0.20	4.00	Copying	attachment to subpoenas
1/27/2011	JAS	Cost	Billed	4.00	0.20	0.80	Copying	file copies subpoenas sent to cahillane
1/28/2011	JAS	Cost	Billed	34.00	0.20	6.80	Copying	final joint pretrial stipulation
1/31/2011	JAS	Cost	Billed	4.00	0.20	0.80	Copying	list of exhibits
1/31/2011	JAS	Cost	Billed	183.00	0.20	36.60	Copying	pension fund trust agmt as plaintiff exhibit for trial
1/31/2011	JAS	Cost	Billed	39.00	0.20	7.80	Copying	cba as plaintiffs exhibit for trial
2/1/2011	JAS	Cost	Draft Bill	2.00	0.20	0.40	Copying	final nom in limine
2/1/2011	JAS	Cost	Draft Bill	8.00	0.20	1.60	Copying	final mol in limine
2/1/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	final drb aff in support of motion in limine
2/1/2011	JAS	Cost	Draft Bill	6.00	0.20	1.20	Copying	exhibit to drb aff
2/2/2011	JAS	Cost	Draft Bill	2.00	0.20	0.40	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	4.00	0.20	0.80	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	1.00	0.20	0.20	Copying	melville testimony outline
2/2/2011	JAS	Cost	Draft Bill	1.00	0.20	0.20	Copying	jagodowski testimony outline
2/2/2011	JAS	Cost	Draft Bill	2.00	0.20	0.40	Copying	auditor invoice

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/2/2011	JAS	Cost	Draft Bill	2.00	0.20	0.40	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	4.00	0.20	0.80	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	4.00	0.20	0.80	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	1.00	0.20	0.20	Copying	lane testimony outline
2/2/2011	JAS	Cost	Draft Bill	1.00	0.20	0.20	Copying	richards testimony outline
2/2/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	2.00	0.20	0.40	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	4.00	0.20	0.80	Copying	auditor invoice
2/2/2011	JAS	Cost	Draft Bill	2.00	0.20	0.40	Copying	email communication
2/2/2011	JAS	Cost	Draft Bill	1.00	0.20	0.20	Copying	shannon testimony outline
2/2/2011	JAS	Cost	Draft Bill	147.00	0.20	29.40	Copying	training fund trust as trial exhibit

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/2/2011	JAS	Cost	Draft Bill	57.00	0.20	11.40	Copying	request for admissions as trial exhibit
2/2/2011	JAS	Cost	Draft Bill	156.00	0.20	31.20	Copying	annuity fund trust as trial exhibit
2/2/2011	JAS	Cost	Draft Bill	36.00	0.20	7.20	Copying	central pension fund trust as trial exhibit
2/2/2011	JAS	Cost	Draft Bill	18.00	0.20	3.60	Copying	collections policy as trial exhibit
2/2/2011	JAS	Cost	Draft Bill	18.00	0.20	3.60	Copying	audit letter
2/2/2011	JAS	Cost	Draft Bill	168.00	0.20	33.60	Copying	welfare fund trust as trial exhibit
2/3/2011	JAS	Cost	Draft Bill	6.00	0.20	1.20	Copying	auditor invoices
2/3/2011	JAS	Cost	Draft Bill	4.00	0.20	0.80	Copying	auditor invoices
2/3/2011	JAS	Cost	Draft Bill	4.00	0.20	0.80	Copying	auditor invoices
2/3/2011	JAS	Cost	Draft Bill	6.00	0.20	1.20	Copying	auditor invoices
2/3/2011	JAS	Cost	Draft Bill	6.00	0.20	1.20	Copying	auditor invoices
2/3/2011	JAS	Cost	Draft Bill	8.00	0.20	1.60	Copying	auditor invoices
2/3/2011	JAS	Cost	Draft Bill	6.00	0.20	1.20	Copying	auditor invoices
2/3/2011	JAS	Cost	Draft Bill	4.00	0.20	0.80	Copying	email communication
2/4/2011	JAS	Cost	Draft Bill	42.00	0.20	8.40	Copying	participant work detail as trial exhibit
2/4/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	exhibit for trial

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/4/2011	JAS	Cost	Draft Bill	45.00	0.20	9.00	Copying	exhibit for trial
2/4/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	exhibit for trial
2/7/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	exhibits for trial
2/7/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	exhibits for trial
2/7/2011	JAS	Cost	Draft Bill	39.00	0.20	7.80	Copying	exhibits for trial
2/7/2011	JLR	Cost	Draft Bill	7.00	0.20	1.40	Copying	print updated spreadsheets for john doe
2/7/2011	JLR	Cost	Draft Bill	6.00	0.20	1.20	Copying	print updated audit spreadsheets
2/8/2011	JAS	Cost	Draft Bill	7.00	0.20	1.40	Copying	jagodowski subpoena
2/9/2011	JAS	Cost	Draft Bill	3.00	0.20	0.60	Copying	list of exhibits
2/9/2011	JAS	Cost	Draft Bill	165.00	0.20	33.00	Copying	remittance reports for trial exhibits
2/9/2011	JAS	Cost	Draft Bill	48.00	0.20	9.60	Copying	audit invoices for trial exhibit
2/9/2011	JAS	Cost	Draft Bill	6.00	0.20	1.20	Copying	payroll audit invoice for trial exhibit
2/14/2011	JAS	Cost	Draft Bill	11.00	0.20	2.20	Copying	spreadsheets
2/14/2011	JAS	Cost	Draft Bill	18.00	0.20	3.60	Copying	auditors letters
2/17/2011	JAS	Cost	Draft Bill	8.00	0.20	1.60	Copying	list of e board members
2/17/2011	JAS	Cost	Draft Bill	244.00	0.20	48.80	Copying	health and welfare fund trust

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/17/2011	JAS	Cost	Draft Bill	265.00	0.20	53.00	Copying	trial exhibits
2/17/2011	JAS	Cost	Draft Bill	187.00	0.20	37.40	Copying	trial exhibits
2/17/2011	LMF	Cost	Draft Bill	2.00	0.20	0.40	Copying	subpoena attachment
2/17/2011	LMF	Cost	Draft Bill	6.00	0.20	1.20	Copying	subpoena for docs
2/18/2011	JAS	Cost	Draft Bill	68.00	0.20	13.60	Copying	jlr affidavit
2/18/2011	LMF	Cost	Draft Bill	19.00	0.20	3.80	Copying	defendant trial brief
2/18/2011	LMF	Cost	Draft Bill	2.00	0.20	0.40	Copying	stipulation evidence final
2/18/2011	LMF	Cost	Draft Bill	1.00	0.20	0.20	Copying	judge letter
2/18/2011	LMF	Cost	Draft Bill	1.00	0.20	0.20	Copying	ecf notice of electronic filing
2/18/2011	LMF	Cost	Draft Bill	60.00	0.20	12.00	Copying	trial brief final
2/20/2011	LMF	Cost	Draft Bill	3.00	0.20	0.60	Copying	exhibit list defendant
2/20/2011	LMF	Cost	Draft Bill	9.00	0.20	1.80	Copying	lane testimony outline
2/20/2011	LMF	Cost	Draft Bill	3.00	0.20	0.60	Copying	jagodowski testimony outline
2/20/2011	LMF	Cost	Draft Bill	4.00	0.20	0.80	Copying	plaintiff exhibit list
2/2012011	LMF	Cost	Draft Bill	2.00	0.20	0.40	Copying	joint exhibit list
2/20/2011	LMF	Cost	Draft Bill	11.00	0.20	2.20	Copying	opening statement draft
2/20/2011	LMF	Cost	Draft Bill	4.00	0.20	0.80	Copying	stipulation evidence
2/20/2011	LMF	Cost	Draft Bill	72.00	0.20	14.40	Copying	martins transcript

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/20/2011	LMF	Cost	Draft Bill	141.00	0.20	28.20	Copying	haluch transcript
2/22/2011	JLR	Cost	Draft Bill	2.00	0.20	0.40	Copying	pnt email from drb rejcting offer
2/24/2011	JLR	Cost	Draft Bill	1.00	0.20	0.20	Copying	pnt updated spreadsheets with jagodowski at 75%
2/24/2011	JLR	Cost	Draft Bill	6.00	0.20	1.20	Copying	pnt updated spreadsheets with jagodowski at 75%
2/24/2011	JLR	Cost	Draft Bill	3.00	0.20	0.60	Copying	pnt updated spreadsheets with jagodowski at 75%
2/24/2011	JLR	Cost	Draft Bill	14.00	0.20	2.80	Copying	pnt updated spreadsheets for approx hrs
2/24/2011	LLD	Cost	Draft Bill	23.00	0.20	4.60	Copying	printed ray haluch lexis info
2/24/2011	LLD	Cost	Draft Bill	1.00	0.20	0.20	Copying	printed haluch gravel lexis info
2/25/2011	JLR	Cost	Draft Bill	2.00	0.20	0.40	Copying	pc memo to drb and klw re bot mtg
2/25/2011	JLR	Cost	Draft Bill	9.00	0.20	1.80	Copying	pc minutes attachment to memo to drb and klw
2/25/2011	JLR	Cost	Draft Bill	52.00	0.20	10.40	Copying	copy spreadsheets for exhibits
2/25/2011	JLR	Cost	Draft Bill	88.00	0.20	17.60	Copying	copy spreadsheets for exhibits
2/25/2011	LLD	Cost	Draft Bill	23.00	0.20	4.60	Copying	printed lexis info re joanne martins

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/25/2011	MGT	Cost	Draft Bill	25.00	0.20	5.00	Copying	Affidavit JLR
3/8/2011	LMF	Cost	WIP	3.00	0.20	0.60	Copying	motion to extend time final
3/14/2011	JAS	Cost	WIP	2.00	0.20	0.40	Copying	electronic filing notification
3/14/2011	JAS	Cost	WIP	11.00	0.20	2.20	Copying	final proposed findings of fact
3/14/2011	JAS	Cost	WIP	2.00	0.20	0.40	Copying	electronic filing notification
3/14/2011	JAS	Cost	WIP	1.00	0.20	0.20	Copying	electronic filing notification
3/14/2011	MGT	Cost	WIP	5.00	0.20	1.00	Copying	final mol
	Subtotal 2011:			**3010.00**		**$602.00**		
	TOTAL:			**5455.00**		**$1,104.50**		
COPY IMPRESSIONS								
3/12/2009	JAS	Cost	Billed	7.00	0.10	0.70	Copy Impressions	final letter to attorney cahillane
4/16/2009	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impressions	final ltr to atty cahillane re audit for faxing
7/27/2009	JAS	Cost	Billed	22.00	0.10	2.20	Copy Impressions	invoices and hours
9/8/2009	JAS	Cost	Billed	5.00	0.10	0.50	Copy Impressions	final ltr atty cahillane requesting providing records
9/24/2009	JAS	Cost	Bdled	1.00	0.10	0.10	Copy Impressions	civil cover sheet
9/24/2009	JAS	Cost	Billed	19.00	0.10	1.90	Copy Impressions	final complaint
10/14/2009	LMF	Cost	Billed	2.00	0.10	0.20	Copy Impression	summonses for efiling

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
10/14/2009	LMF	Cost	Billed	6.00	0.10	0.60	Copy Impression	summonses for efiling
10/22/2009	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	stipulation extending time
10/27/2009	JAS	Cost	Billed	1.00	0.10	0.10	Copy Impression	category form
11/23/2009	JAS	Cost	Billed	6.00	0.10	0.60	Copy Impression	final ltr to atty cahillane with joint statement
12/30/2009	JAS	Cost	Billed	6.00	0.10	0.60	Copy Impression	ltr to atty cahillane with rule 16 joint statement
12/30/2009	JAS	Cost	Billed	6.00	0.10	0.60	Copy Impression	joint statement with attached certificate
Subtotal 2009				**85.00**		**$8.50**		
1/6/2010	JAS	Cost	Billed	8.00	0.10	0.80	Copy Impression	final ltr to atty cahilliane with disclosures
1/14/2010	JAS	Cost	Billed	8.00	0.10	0.80	Copy Impression	downey subpoena
2/26/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	scan final ltr to atty cahillane re responses
3/15/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr to atty cahillane re possible settlement reprint
3/17/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr to atty cahillane re follow up

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
3/19/2010	JAS	Cost	Billed	3.00	0.10	0.30	Copy Impression	final ltr to atty cahillane re amending responses reprint
4/12/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr atty cahmane re depositions for faxing
4/14/2010	JAS	Cost	Billed	2.00	0.10	20.00	Copy Impression	final ltr to judge neiman re cahillane withdrawing as atty
4/21/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr atty cahillane re abiding by cba
5/19/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr to atty cahillane re compliance
5/24/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr to atty cahillane re document review
6/8/2010	JAS	Cost	Billed	4.00	0.10	0.40	Copy Impression	cc ltr todd downey re deposition
6/18/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr judge neiman re individual tax returns
6/18/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr atty cahillane re haluch deposition
6/24/2010	JAS	Cost	Billed	15.00	0.10	1.50	Copy Impression	depo questions and answers
6/24/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr atty cahillane re shannon deposition

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
6/29/2010	DRB	Cost	Billed	5.00	0.10	0.50	Copy Impression	final letter to judge hillman re mediation
7/1/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr atty cahillane re disclosures
7/20/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr to atty cahillane re august depositions
7/29/2010	JAS	Cost	Billed	1.00	0.10	0.10	Copy Impression	final ltr to reporter re shannon deposition
10/4/2010	JAS	Cost	Billed	5.00	0.10	0.50	Copy Impression	cc letter to fanning with affidavit
10/25/2010	JAS	Cost	Billed	8.00	0.10	0.80	Copy Impression	final ltr to melville with affidavit
10/25/2010	JAS	Cost	Billed	12.00	0.10	1.20	Copy Impression	ltr to lane with affidavit
11/4/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr to atty cahillane re transcripts
11/16/2010	JAS	Cost	Billed	67.00	0.10	6.70	Copy Impression	drb aff exhibits a through d
11/16/2010	JAS	Cost	Billed	82.00	0.10	8.20	Copy Impression	drb aff exhibit e
11/16/2010	JAS	Cost	Billed	48.00	0.10	4.80	Copy Impression	drb aff exhibit f
11/16/2010	JAS	Cost	Billed	49.00	0.10	4.90	Copy Impression	drb aff exhibit g through i
11/16/2010	JAS	Cost	Billed	41.00	0.10	4.10	Copy Impression	melville aff support of motion for summary judgment

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
11/16/2010	JAS	Cost	Billed	21.00	0.10	2.10	Copy Impression	shannon aff in support of motion for sj
11/16/2010	JAS	Cost	Billed	20.00	0.10	2.00	Copy Impression	jlr aff in support of motion to sj
11/16/2010	JAS	Cost	Billed	9.00	0.10	0.90	Copy Impression	fanning aff in support of motion to sj
11/16/2010	JAS	Cost	Billed	101.00	0.10	10.10	Copy Impression	lane aff in support of motion to sj
11/16/2010	JAS	Cost	Billed	3.00	0.10	0.30	Copy Impression	notice of motion for summary judgment
11/16/2010	JAS	Cost	Billed	23.00	0.10	2.30	Copy Impression	memo of law in support for summary judgment
11/16/2010	JAS	Cost	Billed	7.00	0.10	0.70	Copy Impression	statement of material facts
11/16/2010	JAS	Cost	Billed	10.00	0.10	1.00	Copy Impression	drb aff in support of motion for sj
11/16/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	cos for summary judgment documents
11/16/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	cos for summary judgment documents
11/16/2010	JAS	Cost	Billed	21.00	0.10	2.10	Copy Impression	mol for summary judgment
12/21/2010	JAS	Cost	Billed	3.00	0.10	0.30	Copy Impression	executed reply aff of Melville
12/21/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final ltr to judge ponsor re adjournment request

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
12/21/2010	JAS	Cost	Billed	3.00	0.10	0.30	Copy Impression	bill shannon reply affidavit
12/22/2010	JAS	Cost	Billed	19.00	0.10	1.90	Copy Impression	final reply
12/22/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final reply cos
12/22/2010	JAS	Cost	Billed	12.00	0.10	1.20	Copy Impression	final response to statement of material facts
12/30/2010	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	final request for adjournment
Subtotal 2010:				**646.00**		**$64.60**		
1/25/2011	JAS	Cost	Billed	1.00	0.10	0.10	Copy Impression	shannon ltr re prep for trial
1/25/2011	JAS	Cost	Billed	1.00	0.10	0.10	Copy Impression	laneltr re prep for trial
1/25/2011	JAS	Cost	Billed	1.00	0.10	0.10	Copy Impression	melville ltr re prep for trial
1/27/2011	JAS	Cost	Billed	2.00	0.10	0.20	Copy Impression	fax to hampden sheriff with richards subpoena
1/27/2011	JAS	Cost	Billed	5.00	0.10	0.50	Copy Impression	ltr atty cahillane with subpoenas
2/14/2011	JAS	Cost	Draft Bill	19.00	0.10	1.90	Copy Impression	jlr aff with exhibits
2/17/2011	JAS	Cost	Draft Bill	64.00	0.10	6.40	Copy Impression	pension trust and amendments
2/17/2011	JAS	Cost	Draft Bill	37.00	0.10	3.70	Copy Impression	welfare trust and amendments
2/17/2011	JAS	Cost	Draft Bill	24.00	0.10	2.40	Copy Impression	welfare trust and amendments
2/18/2011	JAS	Cost	Draft Bill	3.00	0.10	0.30	Copy Impression	exhibit letters
2/18/2011	LMF	Cost	Draft Bill	3.00	0.10	0.30	Copy Impression	judge letter

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
3/14/2011	JAS	Cost	WIP	11.00	0.10	1.10	Copy Impression	findings of fact for efiling
3/14/2011	MGT	Cost	WIP	5.00	0.10	0.50	Copy Impression	final mol proposed findings
	Subtotal 2011:			**176.00**		**$17.60**		
	TOTAL:			**907.00**		**$90.70**		
FACSIMILE CHARGES								
3/1212009	JAS	Cost	Billed	8.00	0.50	4.00	Facsimile Charges	letter to attorney cahillane
4/16/2009	JAS	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	
7/27/2009	DRB	Cost	Billed	23.00	0.50	11.50	Facsimile Charges	Fax to: 1-413-548-9508
8/21/2009	DRB	Cost	Billed	2.00	0.50	1.00	Facsimile Charges	Fax to: 413-737-0121
9/8/2009	DRB	Cost	Billed	6.00	0.50	3.00	Facsimile Charges	Fax to: 413-737-0121
11/2/2009	JAS	Cost	Billed	10.00	0.50	5.00	Facsimile Charges	ltr to atty cahillane with spread-sheets
11/23/2009	DRB	Cost	Billed	6.00	0.50	3.00	Facsimile Charges	Fax to: 413-737-0121
12/30/2009	DRB	Cost	Billed	7.00	0.50	3.50	Facsimile Charges	Fax to: 413-737-0121
	Subtotal 2009:			**65.00**		**$32.50**		
1/6/2010	DRB	Cost	Billed	9.00	0.50	4.50	Facsimile Charges	413-737-0121
1/14/2010	DRB	Cost	Billed	9.00	0.50	4.50	Facsimile Charges	Fax to: 413-737-0121
2/26/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
3/14/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
3/17/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
3/23/2010	DRB	Cost	Billed	4.00	0.50	2.00	Facsimile Charges	Fax to: 413-737-0121
4/12/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
4/21/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
4/30/2010	IDM	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	fax to cahillane
5/19/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
5/19/2010	JAS	Cost	Billed	4.00	0.50	2.00	Facsimile Charges	notice of and order re hearing to b lane
5/24/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
6/8/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-4618
6/8/2010	DRB	Cost	Billed	5.00	0.50	2.50	Facsimile Charges	Fax to: 413-737-0121
6/18/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
6/24/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
7/1/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
7/20/2010	DRB	Cost	Billed	3.00	0.50	1.50	Facsimile Charges	Fax to: 413-737-0121
7/29/2010	DRB	Cost	Billed	2.00	0.50	1.00	Facsimile Charges	Fax to: 413-737-0121
7/29/2010	DRB	Cost	Billed	2.00	0.50	1.00	Facsimile Charges	Fax to: 413-731-7451
	Subtotal 2010:			**74.00**		**$37.00**		

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
1/3/2011	DRB	Cost	Billed	9.00	0.50	4.50	Facsimile Charges	Fax to: 413-737-0121
1/10/2011	JLS	Cost	Billed	8.00	0.50	4.00	Facsimile Charges	Fax to: 970-476-1647
1/14/2011	DRB	Cost	Billed	5.00	0.50	2.50	Facsimile Charges	Fax to: 413-739-2585
1/14/2011	DRB	Cost	Billed	5.00	0.50	2.50	Facsimile Charges	Fax to: 413-525-7553
1/27/2011	DRB	Cost	Billed	6.00	0.50	3.00	Facsimile Charges	Fax to: 413-737-0121
1/27/2011	DRB	Cost	Billed	3.00	0.50	50.00	Facsimile Charges	Fax to: 413-733-6933
1/27/2011	DRB	Cost	Billed	2.00	0.50	1.00	Facsimile Charges	Fax to: 413-585-0152
	Subtotal 2011:			**38.00**		**$19.00**		
	TOTAL:			**177.00**		**$88.50**		
COMPUTER RESEARCH								
3/31/2009	DRB	Cost	Billed	1.00	21.77	21.77	Computer Research	DRB March LexisNexis
4/30/2009	DRB	Cost	Billed	1.00	29.82	29.82	Computer Research	DRB April LexisNexix
12/31/2009	DRB	Cost	Billed	1.00	44.53	44.53	Computer Research	DRB December LexisNexis
	Subtotal 2009:					**$96.12**		
1/6/2010	JAC	Cost	Billed	1.00	0.16	0.16	Computer Research	10/01/09 - 12/31/09 PACER Service

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
7/7/2010	JAC	Cost	Billed	1.00	0.48	0.48	Computer Research	04/01/10 - 06/30/10 PACER Service
10/5/2010	JAC	Cost	Billed	1.00	1.84	1.84	Computer Research	07/01/10 - 09/30/10 PACER Service
12/31/2010	BJL	Cost	Billed	1.00	238.67	238.67	Computer Research	BJL December LexisNexis
12/31/2010	DRB	Cost	Billed	1.00	476.58	476.58	Computer Research	DRB December LexisNexis
12/31/2010	JAC	Cost	Billed	1.00	6.61	6.61	Computer Research	JAC December LexisNexis
	Subtotal 2010:					**$724.34**		
1/5/2011	JAC	Cost	Draft Bill	1.00	0.16	0.16	Computer Research	10/01/10 - 12/31/10 PACER Service
1/31/2011	BJL	Cost	Draft Bill	1.00	64.47	64.47	Computer Research	BJL January LexisNexis
1/31/2011	DRB	Cost	Draft Bill	1.00	379.10	379.10	Computer Research	DRB January LexisNexis
2/28/2011	BTA	Cost	Draft Bill	1.00	1056.81	1056.81	Computer Research	BTA February LexisNexis
2/28/2011	DRB	Cost	Draft Bill	1.00	330.97	330.97	Computer Research	DRB February LexisNexis

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/28/2011	KLW	Cost	Draft Bill	1.00	98.96	98.96	Computer Research	KLW February LexisNexis
2/28/2011	LLD	Cost	Draft Bill	1.00	226.37	226.37	Computer Research	LLD February LexisNexis
	Subtotal 2011:					**$2,156.84**		
	TOTAL:					**$2,977.30**		
FILING FEES								
9/28/2009	DRB	Cost	Billed	1.00	350.00	350.00	Filing Fees	Filing Fees: US District Court Clerk Northern District of NY
10/19/2009	DRB	Cost	Billed	1.00	50.00	50.00	Filing Fees	Filing Fees: US District Court Clerk Western District of Mass
1/26/2011	DRB	Cost	Draft Bill	1.00	50.00	50.00	Filing Fees	Filing Fees: US District Court Clerk Western District of Mass
1/31/2011	DRB	Cost	Draft Bill	1.00	50.00	50.00	Filing Fees	Filing Fees: US District Court Clerk Western District of Mass
	TOTAL:					**$500.00**		
SERVICE OF PROCESS								
9/28/2009	DRB	Cost	Billed	1.00	150.58	150.58	Service of S&C	Service of Summons & Complaint: Hampden County Sheriffs

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
10/28/2009	DRB	Cost	Billed	1.00	10.00	10.00	Service of Process	Office of the Sheriff Hampden County - Service of Process Refund
2/2/2010	DRB	Cost	Billed	1.00	16.46	16.46	Service of Process	Service of Process: Franklin County Sheriff
1/24/2011	BJL	Cost	Draft Bill	1.00	46.56	46.56	Service of Process	Service of Process: Office of the Sheriff Hampshire County
1/26/2011	BJL	Cost	Draft Bill	1.00	67.30	67.30	Service of Process	Service of Process: Hampden County Sheriffs
	TOTAL:					**$270.90**		
MILEAGE								
1/8/2010	DRB	Cost	Draft Bill	1.00	235.00	235.00	Mileage	Mileage - Springfield MA
6/15/2010	DRS	Cost	Draft Bill	1.00	241.00	241.00	Mileage	Mileage - Springfield MA
7/13/2010	DRS	Cost	Draft Bill	1.00	288.75	288.75	Mileage	Mileage - Worcester
8/17/2010	DRS	Cost	Draft Bill	1.00	237.50	237.50	Mileage	Mileage - Springfield Mass
1/6/2011	DRB	Cost	Draft Bill	1.00	235.62	235.62	Mileage	Mileage - Springfield MA
1/24/2011	BJL	Cost	Draft Bill	1.00	11.32	11.32	Mileage	Mileage - Martin Jagodowski
1/26/2011	BJL	Cost	Draft Bill	1.00	20.61	20.61	Mileage	Mileage - Doug Richards
2/4/2011	DRB	Cost	Draft Bill	1.00	247.35	247.35	Mileage	Mileage - Springfield MA

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/16/2011	DRB	Cost	Draft Bill	1.00	248.37	248.37	Mileage	Mileage - Springfield, MA
2/23/2011	DRS	Cost	Draft Bill	1.00	239.70	239.70	Mileage	Mileage - Springfield, MA
2/27/2011	DRS	Cost	Draft Bill	1.00	234.60	234.60	Mileage	Mileage - Springfield MA
	TOTAL					**$2,239.82**		
TRAVEL EXPENSE								
1/8/2010	DRB	Cost	Draft Bill	1.00	18.00	18.00	Travel Expense	Tolls - Springfield MA
1/8/2010	DRB	Cost	Draft Bill	1.00	3.00	3.00	Travel Expense	Parking - Springfield MA
6/15/2010	DRB	Cost	Draft Bill	1.00	17.55	17.55	Travel Expense	Tolls - Springfield MA
6/15/2010	DRB	Cost	Draft Bill	1.00	5.00	5.00	Travel Expense	Parking - Springfield MA
6/15/2010	DRB	Cost	Draft Bill	1.00	107.61	107.61	Travel Expense	Hotel - Springfield MA
7/13/2010	DRB	Cost	Draft Bill	1.00	20.65	20.65	Travel Expense	Tolls - Worcester
7/13/2010	DRB	Cost	Draft Bill	1.00	4.00	4.00	Travel Expense	Parking -Worcester
7/13/2010	DRB	Cost	Draft Bill	1.00	154.51	154.51	Travel Expense	Hotel - Worcester
8/17/2010	DRB	Cost	Draft Bill	1.00	17.70	17.70	Travel Expense	Tolls - Springfield Mass
8/17/2010	DRB	Cost	Draft Bill	1.00	101.16	101.16	Travel Expense	Hotel - Springfield Mass
	Subtotal 2010:					**$449.18**		
1/6/2011	DRB	Cost	Draft Bill	1.00	18.00	18.00	Travel Expense	Tolls - Springfield MA
2/4/2011	DRB	Cost	Draft Bill	1.00	17.10	17.10	Travel Expense	Tolls - Springfield MA

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
2/4/2011	DRB	Cost	Draft Bill	1.00	3.00	3.00	Travel Expense	Parking - Springfield MA
2/16/2011	DRB	Cost	Draft Bill	1.00	17.10	17.10	Travel Expense	Tolls - Springfield, MA
2/16/2011	DRB	Cost	Draft Bill	1.00	9.95	9.95	Travel Expense	Parking - Springfteld. MA
2/16/2011	DRB	Cost	Draft Bill	1.00	162.43	162.43	Travel Expense	Hotel - Springfield, MA
2/23/2011	DRB	Cost	Draft Bill	1.00	17.10	17.10	Travel Expense	Tolls - Springfield, MA
2/23/2011	DRS	Cost	Draft Bill	1.00	19.90	19.90	Travel Expense	Parking - Springfield, MA
2/23/2011	DRB	Cost	Draft Bill	1.00	324.86	324.86	Travel Expense	Hotel - Springfield, MA
2/27/2011	DRB	Cost	Draft Bill	1.00	17.10	17.10	Travel Expense	Tolls - Springfield MA
2/27/2011	DRS	Cost	Draft Bill	1.00	9.95	9.95	Travel Expense	Parking - Springfield MA
2/27/2011	DRB	Cost	Draft Bill	1.00	139.94	139.94	Travel Expense	Hotel - Springfield MA
	Subtotal 2011:					**$756.43**		
	TOTAL					**$1,205.61**		
WITNESS EXPENSE								
1/13/2010	DRB	Cost	Billed	1.00	76.00	76.00	Witness Expense	Witness Expense: Todd Downey
1/24/2011	BJL	Cost	Draft Bill	1.00	40.00	40.00	Witness Expense	Witness Expense: Martin Jagodowski
1/26/2011	BJL	Cost	Draft Bill	1.00	40.00	40.00	Witness Expense	Witness Expense: Doug Richards
	TOTAL:					**$156.00**		

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
POSTAL SERVICE								
6/12/2010	DRS	Cost	Billed	1.00	23.52	23.52	Postal Service	DRB to Todd Downey
	TOTAL:					**$23.52**		
BUSINESS MEALS								
6/15/2010	DRB	Cost	Draft Bill	1.00	27.79	27.79	Business Meals	Meals - Springfield MA
7/13/2010	DRS	Cost	Draft Bill	1.00	29.83	29.83	Business Meals	Meals - Worcester
8/17/2010	DRB	Cost	Draft Bill	1.00	15.00	15.00	Business Meals	Meals - Springfield Mass
1/6/2011	DRB	Cost	Draft Bill	1.00	10.00	10.00	Business Meals	Meals - Springfield MA
2/4/2011	DRS	Cost	Draft Bill	1.00	17.48	17.48	Business Meals	Meals - Springfield MA
2/16/2011	DRB	Cost	Draft Bill	1.00	117.13	117.13	Business Meals	Meals - Springfield, MA
2/23/2011	DRB	Cost	Draft Bill	1.00	88.49	88.49	Business Meals	Meals - Springfteld, MA
2/27/2011	DRB	Cost	Draft Bill	1.00	59.97	$59.97	Business Meals	Meals - Springfield MA
	TOTAL					**$439.64**		
STENOGRAPHIC RECORD								
7/13/2010	DRB	Cost	Billed	1.00	472.15	472.15	Stenographic Record	Stenographic Record: Accurate Court Reporting
7/26/2010	DRB	Cost	Billed	1.00	297.50	297.50	Stenographic Record	Stenographic Record: Perk and Coyle Reporting

Date	ID	Type	Status	Quantity	Rate	Amount	Code	Description
9/20/2010	DRB	Cost	Billed	1.00	285.00	285.00	Stenographic Record	Stenographic Record: Accurate Court Reporting
	TOTAL:					**$1,054.65**		

COPYING:	$1,104.50
COPY IMPRESSIONS:	$90.70
FACSIMILE CHARGES:	$88.50
COMPUTER RESEARCH:	$2,977.30
FILING FEES:	$500.00
SERVICE OF PROCESS:	$270.90
MILEAGE:	$2,239.82
TRAVEL EXPENSE:	$1,205.61
WITNESS EXPENSE:	$156.00
POSTAL SERVICE:	$23.52
BUSINESS MEALS:	$439.64
STENOGRAPHIC RECORD:	$1,054.65
TOTAL COSTS:	$10,151.14

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 HEALTH AND WELFARE, PENSION AND ANNUITY FUNDS, by Barbara Lane, as Administrator; LOCAL 98 ENGINEERS JOINT TRAINING, RETRAINING, SKILL IMPROVEMENT, SAFETY EDUCATION, APPRENTICESHIP AND TRAINING FUND, by Barbara Lane, as Administrator; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 AND EMPLOYERS COOPERATIVE TRUST, by William Sullivan and Eugene P. Melville, Jr., as Trustees; CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, by Michael R. Fanning, as Chief Executive Officer; and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager,

Plaintiffs,

v.

RAY HALUCH GRAVEL CO.; RAY HALUCH, INC.; RAY HALUCH, INC. d/b/a RAY HALUCH GRAVEL CO.; RAY HALUCH GRAVEL COMPANY, INC.; RAY HALUCH GRAVEL COMPANY, INC. d/b/a RAY HALUCH GRAVEL CO.; RAYMOND HALUCH, Individually and as an Officer of RAY HALUCH, INC. and RAY HALUCH GRAVEL COMPANY, INC.; and RAYMOND HALUCH, Individually and d/b/a RAY HALUCH GRAVEL CO.,

Defendants.

AFFIDAVIT OF PETER A. JANUS CONCERNING HOURLY RATE OF PLAINTIFFS' COUNSEL

Civil Action No.: 3:09-CV-11607 (MAP)

State of Connecticut)
County of Hartford) ss:

Peter A. Janus, being duly sworn, deposes and says:

1. I am an attorney licensed in the State of Connecticut and a shareholder in the law firm of Siegel, O'Connor, O'Donnell & Beck, P.C. I submit this affidavit concerning the reasonableness of the hourly rates set forth in the application for attorneys' fees by plaintiffs' counsel, Blitman & King LLP.

2. Our law firm is engaged exclusively to the representation of employers in labor and employment law matters. We represent and counsel both private and public sector management clients throughout the State of Connecticut from our main office in Hartford and a second office in New London. Although concentrated in Connecticut, three members of our firm are licensed to practice in the Commonwealth of Massachusetts and our firm is engaged in matters there on an occasional basis.

3. My own practice is focused on representing employers in various industries in all aspects of employment and labor relations law. I was admitted to practice in the State of Connecticut in 1970 and the District of Columbia in 1974. I am also admitted in a number of federal courts, including the U.S. Court of Appeals for the First Circuit. (I am not admitted in Massachusetts or this Court.) I was inducted a Fellow in the American Bar Association's College of La-

bor and Employment Lawyers in July 2000. I am currently serving a four-year term as an employer member of the governing Council of the Section of Labor and Employment Law of the American Bar Association ("ABA").

4. I have known the plaintiffs' trial counsel, Kenneth L. Wagner, for approximately 15 years. We are both active members of the ABA'S Committee on the Development of the Law under the National Labor Relations Act ("DLL"). Among other things, Mr. Wagner and I served together as co-chairs of the DLL Committee and were senior editors of The Developing Labor Law (5th Ed. 2006), a leading treatise in the field. I am also well acquainted with a number of other members of the law firm of Blitman & King, through other service and participation in the Section of Labor and Employment Law.

5. I am advised that the maximum hourly rate sought in connection with work performed in connection with the above-captioned matter has ranged from $235.00 per hour in 2008, rising to $260.00 per hour in 2011. In my opinion, based on my knowledge of the prevailing hourly rate for legal services in connection with labor and employment law matters in the neighboring locality of Hartford and throughout the State of Connecticut, these rates are reasonable. Our firm's current rates for a highly experienced attorney in federal court litigation in labor and employment matters range between $250.00 and $350.00 per hour.

/s/ Peter A. Janus
Peter A. Janus

Sworn to before me this 4th day of April, 2011.

/s/ April Barrington
APRIL BARRINGTON
Notary Public
MY COMMISSION EXPIRES JULY 31, 2014

I hereby certify that a true copy of the above document was served upon the attorney of record for Defendants, by electronically filing the document using the CM/ECF system on April 4, 2011.

/s/ Kenneth L. Wagner
Kenneth L. Wagner, of Counsel

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 HEALTH AND WELFARE, PENSION AND ANNUITY FUNDS, by Barbara Lane, as Administrator; LOCAL 98 ENGINEERS JOINT TRAINING, RETRAINING, SKILL IMPROVEMENT, SAFETY EDUCATION, APPRENTICESHIP AND TRAINING FUND, by Barbara Lane, as Administrator; INTERNATIONAL UNION OF OPERATING) ENGINEERS LOCAL 98 AND EMPLOYERS COOPERATIVE TRUST, by) William Sullivan and Eugene P. Melville, Jr., as Trustees; CENTRAL) PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, by Michael R. Fanning, as Chief Executive Officer; and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager,

Plaintiffs,

v.

RAY HALUCH GRAVEL CO.; RAY HALUCH, INC.; RAY HALUCH, INC. d/b/a RAY HALUCH GRAVEL CO.; RAY HALUCH GRAVEL COMPANY, INC.; RAY HALUCH GRAVEL COMPANY, INC. d/b/a RAY HALUCH GRAVEL CO.; RAYMOND HALUCH, Individually and as an Officer of RAY HALUCH, INC. and RAY HALUCH GRAVEL COMPANY, INC.; and RAYMOND HALUCH, Individually and d/b/a RAY HALUCH GRAVEL CO.,

Defendants.

Civil Action No.:
09-CV-11607 (MAP)

NOTICE OF APPEAL

NOTICE is hereby given that International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, by Barbara Lane, as Administrator; Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, by Barbara Lane, as Administrator; International Union of Operating Engineers Local 98 and Employers Cooperative Trust, by William Sullivan and Eugene P. Melville, Jr., as Trustees; Central Pension Fund of the International Union of Operating Engineers and Participating Employers, by Michael R. Fanning, as Chief Executive Officer; and International Union of Operating Engineers Local 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager, the plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the First Circuit from the Judgment and the Court's Memoranda and Order, both entered in this action on June 17, 2011, and from the Court's Memorandum and Order entered on July 25, 2011.

Dated: August 15, 2011

Respectfully submitted,

BLITMAN & KING, LLP

By: */s/ Kenneth L. Wagner*

Kenneth L. Wagner, of Counsel
Attorneys for Plaintiffs
Office and Post Office Address
Franklin Center, Suite 300
443 North Franklin Street
Syracuse, New York 13204-1415
Telephone: (315) 422-7111
Facsimile: (315) 471-2623
E-mail: klwagner@bklawyers.com

I hereby certify that a true copy of the above document was served upon the attorney of record for Defendants, by electronically filing the document using the CM/ECF system on August 15, 2011.

/s/ Kenneth L. Wagner
Kenneth L. Wagner, of Counsel

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 09-I 1607-MAP

International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, et al

Plaintiffs

v.

Ray Haluch Gravel Co., et al

Defendant

DEFENDANT'S NOTICE OF APPEAL

Notice is hereby given that Ray Haluch Gravel Co., and all existing defendants, hereby appeal to the United States district Court of Appeals for the First Circuit from the Judgment and Court's Memorandum and Order entered June 27, 2011 and the Court's Memorandum and Order entered on July 25, 2011.

THE DEFENDANT, RAY HALUCH,
By his attorney

/S/ Maurice M. Cahillane

Maurice M. Cahillane, Esq.
EGAN, FLANAGAN and COHEN, P.C.
67 Market St., P.O. Box 9035
Springfield, MA 01102
Phone: (413) 737-0260;
Fax: (413) 737-0121
BBO# 069660
mmc@eganflanagan.com

August 22, 2011

CERTIFICATE OF SERVICE

I, Maurice M. Cahillane, hereby certify that I served the foregoing document on plaintiffs by serving a true copy of same in hand to Daniel Brice, Esq., Blitman & King, 443 No. Franklin Street, Syracuse, NY 13204-5412.

August 22, 2011

/S/ Maurice M. Cahillane
Maurice M. Cahillane

United States Court of Appeals
For the First Circuit

Nos. 11-1944; 11-1970

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, by Michael R. Fanning, as Chief Executive Officer; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 HEALTH AND WELFARE, PENSION AND ANNUITY FUNDS, by Barbara Lane, as Administrative Manager; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98 AND EMPLOYERS COOPERATIVE TRUST, by William Sullivan and Eugene P. Melville, Jr., as Trustees; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager; LOCAL 98 ENGINEERS JOINT TRAINING, RETRAINING, SKILL IMPROVEMENT, SAFETY EDUCATION, APPRENTICESHIP AND TRAINING FUND, by Barbara Lane, as Administrative Manager

Plaintiffs - Appellants/Cross-Appellees,

RAY HALUCH GRAVEL CO.; RAY HALUCH INC., d/b/a Ray Gravel Co.; RAY HALUCH, INC., d/b/a Ray Haluch Gravel Co.; RAY HALUCH GRAVEL COMPANY, INC., d/b/a Ray Haluch Gravel Co.; RAYMOND HALUCH, individually and as an Officer of Ray Haluch, Inc. and Ray Haluch Gravel Company, Inc.; RAYMOND HALUCH, individually and d/b/a Ray Haluch Gracel Co

Defendant - Appellee/Cross-Appellant.

ORDER OF COURT

Entered: October 3, 2011
Pursuant to 1st Cir. R. 27.0(d)

The parties have filed cross-appeals in Civil Action No. 09-11607 (D. Mass.). Pursuant to Fed. R. App. P. 28.1, it is hereby ordered that Central Pension Fund of the International Union of Operating Engineers and Participating Employers, International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, International Union of Operating Engineers Local 98 and Employers Cooperative Trust, International Union of Operating Engineers Local 98, AFL-CIO; Local 98 Engineers Joint Training, Retraining, Skill Improvement, and Safety Education, Apprenticeship and Training Fund be deemed the appellants/cross-appellees ("appellants") and that the Ray Haluch Gravel Co., Ray Haluch Inc., Ray Haluch, Inc., Ray Haluch Gravel Company, Inc., Raymond Haluch, Ray Haluch Gravel Company, Inc., and Raymond Haluch be deemed the appellees/cross-appellants ("appellees"). The parties are directed to use the above caption on all future filings related to these cases.

The parties' respective notices of appeal purport to appeal from the district court's memorandum and order (# 72) and judgment (# 73) that entered on June 17, 2011, and memorandum and order on plaintiffs' motion for attorneys' fees (# 74) that entered on July 25, 2011. Upon review of the record, it appears that this court may only have jurisdiction to review the memorandum and order that entered on plaintiffs' motion for attorneys' fees. See Fed. R. App. P. 4(a)(1)(A) & (a)(4)(A)(iii).

Accordingly, appellants and appellees are each ordered to show cause, in writing, why the appeal should include an appeal from the district court's memorandum and order (#72) and judgment (#73) that entered on June 17, 2011. The failure to respond filed by **October 17, 2011**, may limit the respective parties' appeal to a challenge of the district court's order addressing the plaintiffs' motion for attorneys' fees.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Cahillane, Maurice M.
Wagner, Kenneth L.
Blitman, Charles E.
Brice, Daniel R.
Clark, Jennifer A.
Aguiar, Jose Antonio

United States Court of Appeals
For the First Circuit

Nos. 11-1944, 11-1970

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, by Michael R. Fanning, as Chief Executive Officer, ET AL.,

Plaintiffs, Appellants/Cross-Appellees,

v.

RAY HALUCH GRAVEL CO., ET AL.,

Defendants, Appellees/Cross-Appellants.

ORDER OF COURT

Entered: January 24, 2012

Having considered the response to the show cause order, we direct that a briefing schedule be set and invite the parties to address any question of timeliness in their briefs along with the merits. See generally Carolina Power & Light Co. v. Dynegy Marketing & Trade, 415 F.3d 354 (4th Cir. 2005) (discussing import of resolution of contractual attorneys' fees provision to finality of judgment).

So ordered.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Wagner, Kenneth L.
Blitman, Charles E.
Brice, Daniel R. Clark, Jennifer A.
Aguiar, Jose Antonio

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 27 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 12-992

In the Supreme Court of the United States

RAY HALUCH GRAVEL CO., ET AL.,

Petitioners,

v.

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONERS

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(202) 263-3000
dhimmelfarb@mayerbrown.com

Counsel for Petitioners

QUESTION PRESENTED

In *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), this Court held that a district court's decision on the merits that left unresolved a request for statutory attorney's fees was a "final decision" under 28 U.S.C. § 1291. The question presented in this case, on which there is an acknowledged conflict among nine circuits, is whether a district court's decision on the merits that leaves unresolved a request for *contractual* attorney's fees is a "final decision" under 28 U.S.C. § 1291.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners here, and defendants-appellees/cross-appellants below, are Ray Haluch Gravel Co.; Ray Haluch Inc., d/b/a Ray Gravel Co.; Ray Haluch, Inc., d/b/a Ray Haluch Gravel Co.; Ray Haluch Gravel Company, Inc., d/b/a Ray Haluch Gravel Co.; Raymond Haluch, individually and as an Officer of Ray Haluch, Inc. and Ray Haluch Gravel Company, Inc.; and Raymond Haluch, individually and d/b/a Ray Haluch Gravel Co.

Respondents here, and plaintiffs-appellants/cross-appellees below, are Central Pension Fund of the International Union of Operating Engineers and Participating Employers, by Michael R. Fanning, as Chief Executive Officer; International Union of Operating Engineers Local 98 Health and Welfare, Pension and Annuity Funds, by Barbara Lane, as Administrative Manager; International Union of Operating Engineers Local 98 and Employers Cooperative Trust, by William Sullivan and Eugene P. Melville, Jr., as Trustees; International Union of Operating Engineers Local 98, AFL-CIO, by Eugene P. Melville, Jr., as Business Manager; and Local 98 Engineers Joint Training, Retraining, Skill Improvement, Safety Education, Apprenticeship and Training Fund, by Barbara Lane, as Administrative Manager.

CORPORATE DISCLOSURE STATEMENT

No petitioner has a parent corporation and no publicly held company owns 10% or more of any petitioner's stock.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 695 F.3d 1. The judgment of the court of appeals dismissing petitioners' cross-appeal (Pet. App. 19a) is unreported. The district court's memorandum and order setting forth its findings of fact and conclusions of law (*id.* at 20a-38a) is reported at 792 F. Supp. 2d 129. The district court's judgment (Pet. App. 39a-40a) is unreported. The district court's memorandum and order regarding respondents' motion for attorney's fees (*id.* at 41a-48a) is reported at 792 F. Supp. 2d 139.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2012. On December 3, 2012, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including February 8, 2013. The petition was filed on that date and was granted on June 17, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

1. 28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

2. 28 U.S.C. § 2107(a) provides, in relevant part: "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of

appeal is filed, within thirty days after the entry of such judgment, order or decree."

3. Federal Rule of Appellate Procedure 4(a)(1)(A) provides, in relevant part: "In a civil case, * * * the notice of appeal * * * must be filed with the district clerk within 30 days after entry of the judgment or order appealed from."

STATEMENT

The district court in this case issued a decision on the merits and then awarded attorney's fees in a separate order more than a month later. Respondents filed a notice of appeal within 30 days of the latter order but not within 30 days of the former one. The same situation arose in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), and this Court unanimously held that the notice of appeal was timely as to the decision on attorney's fees but not as to the decision on the merits, because the fee award was collateral.

Despite the fact that *Budinich* adopted a "bright-line rule," 486 U.S. at 202, the First Circuit in this case held that the notice of appeal was timely as to *both* decisions—and proceeded to vacate them. It distinguished *Budinich* on the ground that the attorney's fees in that case were based on a statute, whereas those in this case are based on a contract. It adopted a rule according to which a contractual fee award is *not* collateral when it is part of the "merits," and then determined, based on an analysis of the contract at issue and respondents' claim under it, that the fee award in *this* case was part of the "merits." The First Circuit thus concluded that there was no appealable "final decision" in the district court, 28 U.S.C. § 1291, until the fee award was made.

The First Circuit's rule depends upon a case-by-case and hard-to-apply distinction between "merits" and "nonmerits" fee awards that *Budinich* expressly rejected in favor of a clear, predictable, and uniform rule. The decision below is thus flatly inconsistent with *Budinich* and should be reversed.

A. This Court's Decision In *Budinich*

Federal courts of appeals have jurisdiction of appeals from "final decisions" of district courts. 28 U.S.C. § 1291. A notice of appeal ordinarily must be filed within 30 days after entry of the judgment or order appealed from. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). This time limit is mandatory and jurisdictional. *Bowles* v. *Russell*, 551 U.S. 205 (2007).

In *Budinich*, the district court had issued a decision on the merits on May 14, 1984 and a separate decision on attorney's fees (which were recoverable by "the winning party" under a state statute) on August 1, 1984. 486 U.S. at 197-198 (quoting Colo. Rev. Stat. § 8-4-114 (1986)). The plaintiff sought to appeal both decisions in a notice of appeal filed on August 29, 1984, which was less than 30 days after the decision on attorney's fees but more than 30 days after the decision on the merits. *Id.* at 198. This Court unanimously held that the appeal was timely as to the decision on attorney's fees, which were collateral, but not as to the decision on the merits, which was final when entered. *Id.* at 198-203.

The principal justification for the Court's decision was that, at least "[a]s a general matter," "a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Budinich*, 486 U.S. at 200. The Court rejected the view that "the

general status of attorney's fees" for Section 1291 purposes "must be altered" when, as was assertedly the case in *Budinich*, the "law authorizing them" characterizes the fees as "part of the merits judgment." *Id.* at 201.

In rejecting the proffered distinction between "merits" and "nonmerits" fee awards, the Court emphasized that "[t]he considerations that determine finality are not abstractions," but instead demand a "practical approach." *Budinich*, 486 U.S. at 201-202 (internal quotation marks omitted; brackets added by Court). What is "of importance" under this approach, the Court explained, is not "preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits,'" but rather "preservation of operational consistency and predictability in the overall application of § 1291." *Id.* at 202. This requires "a uniform rule." *Ibid.*

The Court went on to say that "no interest pertinent to § 1291 is served by according different treatment to attorney's fees deemed part of the merits recovery" and that "a significant interest is disserved"—namely, that "[t]he time of appealability, having jurisdictional consequences, should above all be clear." *Budinich*, 486 U.S. at 202. The Court thus was "not inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known." *Ibid.* Instead, the Court concluded that "[c]ourts and litigants are best served by [a] bright-line rule." *Ibid.*

B. The District Court's Decisions In This Case

1. Petitioner Ray Haluch, Inc. originally operated a sand and gravel business that performed construction work. Pet. App. 2a, 23a-24a. For the past 20 years, however, it has operated a business that sells landscaping products. *Id.* at 2a, 24a. In June 2005 petitioner Ray Haluch Gravel Company, Inc. entered into a collective bargaining agreement with respondent union. *Id.* at 2a-3a, 24a; JA 23-29. The agreement obligated the company to make certain contributions to respondent union-benefit funds. Pet. App. 3a. It also provided that "[a]ny costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer." *Id.* at 9a; JA 26.

Petitioner Ray Haluch, who owned the business until 2006, believed that the collective bargaining agreement required that benefits be paid only on behalf of an employee named Todd Downey. Pet. App. 24a. After the funds commissioned an audit of the company, they demanded additional contributions on behalf of an employee named Martin Jagodowski and unidentified employees who had worked at the company after Jagodowski left. *Id.* at 3a, 26a-27a. The company refused to make the payments. *Id.* at 3a, 28a.

On September 25, 2009, respondents sued petitioners in the District of Massachusetts, JA 30-55, seeking to recover benefit-plan contributions under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, and the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141 *et seq.* The complaint demanded $35,863.06 in contributions on behalf of Jagodowski and

$156,988.54 on behalf of unidentified employees. Pet. App. 46a. In February 2011 the district court conducted a three-day bench trial and took the matter under advisement. *Id.* at 3a, 20a.

On April 4, 2011, respondents filed a motion for attorney's fees and costs. JA 71-198. According to a supporting affidavit, JA 74, the fees and costs were sought under "the collective bargaining agreement" and ERISA, Section 502 of which authorizes an award of "reasonable attorney's fees and costs of the action" if there is "a judgment in favor of the plan," 29 U.S.C. § 1132(g)(2)(D). The motion sought a total of $143,600.44 in attorney's fees and costs, which consisted of $126,912.30 in "attorneys' and paralegals' fees," $6,537.00 in "audit fees and costs," and $10,151.14 in "costs and disbursements." JA 69, 75, 79, 140, 194. Of the claimed attorney's fees, less than $5,000 was incurred prior to the filing of the complaint. JA 81-88; see Br. in Opp. 5.

2. The district court issued two decisions that are relevant here.

On June 17, 2011, the court issued a memorandum and order setting forth its findings of fact and conclusions of law. Pet. App. 23a-38a. The court found that respondents were entitled to recover benefit contributions for certain hours worked by Jagodowski, *id.* at 28a-33a, but not for hours worked by unidentified employees, *id.* at 35a-38a, because there was "no evidence * * * indicating that *any* other classified employee actually performed work under the [collective bargaining] [a]greement after Jagodowski left," *id.* at 37a. The court awarded respondents $10,267.11 in delinquent contributions and deductions, $8,545.31 in interest, and $8,084.99 in liquidated damages, for a total award of

$26,897.41. *Id.* at 33a-35a. The court directed the clerk to enter judgment for respondents in that amount and stated that it would rule on respondents' motion for attorney's fees "in a separate memorandum to follow." *Id.* at 38a. A judgment in the case was issued the same day. *Id.* at 39a-40a.[1]

On July 25, 2011, the district court issued its separate memorandum on attorney's fees and costs. Pet. App. 41a-48a. After calculating the fee "lodestar," *id.* at 41a-46a, the court reduced it to account for the fact that respondents had recovered less than they sought on behalf of Jagodowski and nothing at all on behalf of unidentified employees, *id.* at 46a-47a. The court ultimately awarded respondents $18,000 in attorney's fees. *Id.* at 47a. It also awarded them $16,688.15 in costs, which included the audit fees. *Id.* at 47a & n.1.

On August 15, 2011, respondents filed a notice of appeal of both the district court's order and judgment of June 17, 2011 (addressing remittances) and its order of July 25, 2011 (addressing attorney's fees). JA 199-201. Respondents' notice of appeal was filed less than 30 days after the district court's decision on attorney's fees but more than 30 days after its decision on remittances. Petitioners filed a cross-appeal a week after respondents filed their appeal. JA 202-203.

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[1] In the June 17 order the district court also denied a motion by petitioners to enforce a settlement agreement. Pet. App. 21a-23a. That ruling is no longer at issue.

C. The Court Of Appeals' Decision In This Case

1. After the notices of appeal were filed, the court of appeals issued an order expressing concern that it "may only have jurisdiction to review the memorandum and order that entered on plaintiffs' motion for attorneys' fees" and directing the parties to address "why the appeal should include an appeal from the district court's" earlier order and judgment on remittances. JA 205-206. After hearing from respondents, the court directed that a briefing schedule be set and invited the parties "to address any question of timeliness in their briefs along with the merits." JA 207.

The parties did so, with respondents taking the position that their appeal was timely as to both decisions, Resp. C.A. Br. 18-25; Resp. C.A. Reply Br. 3-9, and petitioners taking the position that it was timely only as to the later one, Pet. C.A. Br. 10-16; Pet. C.A. Reply Br. 1-2. On the merits, respondents claimed that they were entitled to additional remittances for unidentified employees and that, because they were entitled to additional remittances, the award of attorney's fees was too low. Resp. C.A. Br. 25-47. In their cross-appeal, petitioners claimed that the attorney's fees were too *high*, because the district court failed to disallow or at least reduce the amounts attributable to travel time and expenses. Pet. C.A. Br. 16-19. Petitioners did not challenge the order on remittances.

2. The court of appeals held that it had jurisdiction to review both of the district court's orders, vacated each of them, and remanded for further proceedings. Pet. App. 1a-18a.

a. The court of appeals observed that the jurisdictional question in this case is whether respondents' "notice of appeal was timely as to the first judgment," which in turn requires a determination of "whether the first judgment was a final judgment." Pet. App. 5a. The court of appeals recognized that "[t]he point of embarkation for this inquiry" is *Budinich*, which held that "[t]he judgment on the merits" in that case was "final when rendered"; that "the fees issue was wholly collateral"; and that the appeal therefore was untimely as to the judgment on the merits, because it "should have been taken within thirty days" of that decision but was not. *Id.* at 5a-6a.

The court of appeals pointed out that, on "the question of where and how" the "bright-line rule" of *Budinich* "should be drawn" in a case, like this, that involves a *contractual* fee provision, "the courts of appeals * * * are in disarray." Pet. App. 6a. While the Second, Fifth, Seventh, and Ninth Circuits "have held that *Budinich* applies to all claims for attorneys' fees," the First Circuit noted, the Fourth, Eighth, and Eleventh Circuits "have held, on various rationales, that contractual claims for attorneys' fees may fall beyond the *Budinich* line." *Id.* at 6a-7a.

The court of appeals aligned itself with the latter group, concluding that *Budinich* should not be read to apply to "all claims for attorneys' fees." Pet. App. 7a. Instead the First Circuit held that, "[w]here, as here, an entitlement to attorneys' fees derives from a contract rather than from a statute, the critical question is whether the claim for attorneys' fees is part of the merits." *Id.* at 8a.

Analyzing the contract at issue in this case, and respondents' claim under it, Pet. App. 8a-9a, the

court of appeals determined that the fees here "are damages"; that, as such, they "are part of the merits of [respondents'] contract claim"; and that they accordingly "fall beyond the line drawn by the *Budinich* Court." *Id.* at 9a. In reaching this conclusion, the First Circuit thought it "[p]ertinent[]" that respondents "sought recovery of both unpaid remittances and attorneys' fees" in their complaint, *id.* at 3a, and that they "consistently have asserted an entitlement" to fees "[t]hroughout the litigation," *id.* at 8a-9a. The court also found it significant that the agreement in question provided, not that "a prevailing party would be entitled to attorneys' fees," but that the employer was required to pay "'[a]ny costs, including legal fees, of collecting payments due'" the funds. *Id.* at 9a (quoting collective bargaining agreement).

The court of appeals thus found that "no final judgment entered until the district court resolved the contract-based claim for attorneys' fees" and that respondents' appeal was for that reason "timely as to all the issues raised." Pet. App. 9a.

b. Having concluded that it had jurisdiction to review both the district court's order and judgment on remittances and its order on attorney's fees, the court of appeals vacated both of them and remanded for further proceedings. Pet. App. 9a-18a. As to remittances, the First Circuit agreed with respondents that "the district court should have ordered additional payments with respect to certain unidentified employees," *id.* at 9a-10a, and remanded for a determination of "remittances owed on account of covered work" by those employees, *id.* at 17a. As to attorney's fees, the court of appeals ruled that, because the district court's fee calculation rested in part on

respondents' "lack of success in recovering remittances referable to unidentified employees," and "[b]ecause we have ruled that the plaintiffs are entitled to some level of payment for this work," the fee award "will have to be recalculated" on remand "after the appropriate amount of unpaid remittances is determined." *Id.* at 17a-18a. In light of the remand for recalculation of attorney's fees, the First Circuit dismissed petitioners' cross-appeal without prejudice. *Id.* at 18a n.7, 19a.

SUMMARY OF ARGUMENT

Budinich v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), held that a decision on the merits that leaves unresolved a request for attorney's fees is a "final decision" under 28 U.S.C. § 1291. *Budinich* involved attorney's fees awarded under a statute, but the same rule applies to fees awarded under a contract.

A. The rationale for the rule adopted in *Budinich* is that, "[a]s a general matter," a claim for attorney's fees "is not part of the merits" and that the "general status" of attorneys' fees should not be "altered" even when the law deems the fees "part of the merits" in a particular case. *Budinich*, 486 U.S. at 200-201. The general status of fees should not be altered on a case-by-case basis, the Court explained, because what matters is "operational consistency and predictability" in the application of Section 1291 and because the time of appealability "should above all be clear." *Id.* at 202. The Court found that these considerations require a "uniform" and "bright-line" rule. *Ibid.*

Budinich's broad language and reasoning compel the conclusion that its holding applies regardless of

the source of authority for the fee award. Distinguishing between statutory and contractual fees undermines the objectives of consistency, predictability, and clarity, and is neither a uniform nor a bright-line rule. Indeed, the distinction is not only impractical but unworkable, since it cannot account for a case, like this, in which a party seeks attorney's fees under *both* a statute *and* a contract. For these reasons, a separate contractual fee award, like a separate statutory award, is *always* collateral, such that an earlier decision on the merits is final when issued.

B. In the decision below, the First Circuit held that a contractual fee award is *sometimes* collateral. It adopted a rule according to which contractual fee awards are not collateral if they are part of the "merits" and collateral if they are not part of the "merits." That rule is inconsistent with *Budinich* and accordingly wrong.

To begin with, *Budinich* categorically rejected the "merits"–"nonmerits" distinction. The decision explained that "preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits'" is not "of importance" in this context. *Budinich*, 486 U.S. at 202. It went on to say that "no interest pertinent to § 1291 is served" by treating "merits" and "nonmerits" fee awards differently and that "significant interest[s]" are "disserved"—namely, the need for operational consistency, predictability, and clarity. *Ibid.*

The First Circuit believed that, although "attorneys' fees *generally* should be considered a collateral matter" under *Budinich*, "they may *sometimes* be considered as part of the merits." Pet. App. 7a-8a (emphasis added). But the whole point of *Budinich*'s "uniform" and "bright-line" rule, 486 U.S. at 202, is

that, precisely *because* attorney's fees *generally* are collateral, they *always* should be treated as collateral in determining whether a prior decision is final, *even though* attorney's fees *sometimes* are part of the merits. This Court *rejected* the argument that "the general status of attorney's fees for § 1291 purposes must be altered" when, as was assertedly the case there, the "law authorizing them" requires that they be treated as "part of the merits." *Id.* at 201.

The First Circuit's rule is inconsistent with *Budinich* for the related reason that it requires a fact-intensive analysis of both the specific contract at issue and the underlying claim in each case. *Budinich* expressly rejected a rule that would "require[] the merits or nonmerits status *of each attorney's fee provision* to be clearly established before the time to appeal can be clearly known." 486 U.S. at 202 (emphasis added).

Finally, the First Circuit's rule is inconsistent with *Budinich* because it is hard to apply. Even a proponent of the rule has recognized that contractual language "will often be ambiguous" as to whether attorney's fees are part of the "merits," and that it will sometimes suggest that fees "are a hybrid" of both "merits" and "nonmerits" relief. *Carolina Power & Light Co.* v. *Dynegy Mktg. & Trade*, 415 F.3d 354, 363 (4th Cir. 2005) (Wilkinson, J., concurring). More importantly, it is unclear just how one is supposed to go about determining whether a contractual attorney's fee award is a "merits" or a "nonmerits" award in the first place.

The court below distinguished between fees for "collecting payments due" under the contract (which supposedly are "merits" fees) and those for a "prevailing party" in the litigation (which supposedly are

not). Pet. App. 9a. But as even the like-minded Fourth Circuit has acknowledged, "a party will be able to satisfy the condition precedent to recovering legal costs" under the former type of contractual provision "in exactly the circumstances in which the claimant can also 'prevail' in a breach of contract claim," and in almost all cases, including this one, contractual attorney's fees will have been "incurred mostly in connection with th[e] litigation" itself. *Carolina Power & Light*, 415 F.3d at 360-362. The impracticability of the First Circuit's rule is confirmed by the fact that the Third Circuit has reached conflicting results in applying a similar rule in different cases, and by the fact that judges of the Eighth Circuit came to different outcomes in applying an essentially identical rule in the *same* case.

C. The Eleventh Circuit has adopted a third approach: that a contractual fee award is *never* collateral. That rule is incorrect too. To begin with, distinguishing between statutory and contractual attorney's fees is inconsistent with *Budinich*, because, as already explained, it disregards the need for "consistency," "predictability," and "cl[arity]," and is neither a "uniform" nor a "bright-line" rule. *Budinich*, 486 U.S. at 202. The Eleventh Circuit's rule also is inconsistent with *Budinich* in that, like the First Circuit's rule, it rests on a distinction between "merits" and "nonmerits" fees that *Budinich* expressly rejected—with the difference that, in the Eleventh Circuit, *all* contractual fees are "merits" fees and all statutory fees are not. Finally, while *Budinich* made clear that "conceptual consistency" is not important in this context, *ibid.*, the Eleventh Circuit's rule does not even have that to recommend it, because there is no reason to suppose that a particular contractual attorney's fee award is any more likely than a statu-

tory fee award to be a "merits" rather than a "non-merits" award.

ARGUMENT

Twenty-five years ago, in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), this Court unanimously held that a district court's decision on the merits that left unresolved a request for statutory attorney's fees was a "final decision" under 28 U.S.C. § 1291 even if the law regarded the fee award as part of the "merits." In this case, the First Circuit held that a district court's decision on the merits that left unresolved a request for *contractual* attorney's fees was *not* a "final decision" under Section 1291 precisely *because* the law regarded the fee award as part of the "merits."

The First Circuit's rule—that a contractual fee award is *sometimes* collateral, depending on whether it is part of the "merits"—is irreconcilable with *Budinich* and therefore wrong. So too is the Eleventh Circuit's rule, under which a contractual fee award is *never* collateral. The correct rule is that, just like a statutory fee award, a contractual fee award—whether "merits" or "nonmerits"—is *always* collateral.

A. A Contractual Fee Award Is Always Collateral

Budinich held that an attorney's fee award is always collateral for purposes of determining the time to appeal an earlier decision on the merits under 28 U.S.C. § 1291. The fee award in *Budinich* was based on a statute. But four circuits have held that the

same rule applies to a contractual fee award.[2]

Those decisions are correct. Nothing in *Budinich* suggests that the applicability of its holding depends upon the happenstance of whether the award of attorney's fees arose under a statute or a contract—or, for that matter, a rule, a regulation, judge-made law, a court's inherent authority, or any other source of law. Quite the reverse.

The basic justification for the rule adopted in *Budinich* is that, "[a]s a general matter," a claim for attorney's fees "is not part of the merits of the action to which the fees pertain," but instead is collateral to the merits, and that the "general status of attorney's fees for § 1291 purposes" should not be "altered" in a particular case even when "the statutory or decisional law authorizing them makes plain * * * that they *are* * * * part of the merits." *Budinich*, 486 U.S. at 200-201 (emphasis added). The general rule should not be altered on a case-by-case basis, the Court ex-

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[2] See, *e.g.*, *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197, 1200 (5th Cir. 1990) ("the 'bright-line' rule announced in *Budinich* covers all attorneys' fees, whether provided by statute or contract"); *Cont'l Bank, N.A.* v. *Everett*, 964 F.2d 701, 702 (7th Cir. 1992) (Easterbrook, J.) ("An open issue about legal fees, contractual or otherwise, does not affect our jurisdiction to resolve the appeal [of the merits]." (citing *Budinich*)); *United States ex rel. Familian Nw., Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 955 (9th Cir. 1994) ("attorney's fees are collateral whether they are authorized by [statute] or by [contract]" (citing *Budinich*, 486 U.S. at 201)); *O & G Indus., Inc.* v. *Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 168 n.11 (2d Cir. 2008) (rejecting the view that "the non-finality of an award of attorneys' fees sought as an element of contractual damages renders non-appealable the entire judgment in which such award is incorporated" (citing *Budinich*, 486 U.S. at 202)).

plained, because "what is of importance" in this context is "preservation of operational consistency and predictability in the overall application of § 1291" and because "[t]he time of appealability, having jurisdictional consequences, should above all be clear." *Id.* at 202.

That jurisdictional rules should be simple, clear, and certain has informed this Court's interpretation of statutes, not only in *Budinich*, but in many cases since. Indeed, this principle has been one of the most prominent features of the Court's decisions on jurisdictional issues, some of which cite *Budinich* itself.[3]

In *Budinich*, the Court concluded that the need for predictability and clarity "requires * * * a *uniform rule* that an unresolved issue of attorney's fees

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[3] See, *e.g.*, *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 176 n.3 (1989) ("'[w]hat is of importance here is * * * operational consistency and predictability in the overall application of the [finality requirement] of § 1291'" (quoting *Budinich*, 486 U.S. at 202; second set of brackets added by Court)); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 99 (1994) ("'[t]he time of appealability, having jurisdictional consequences, should above all be clear'" (quoting *Budinich*, 486 U.S. at 202; brackets added by Court)); *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997) (emphasizing the need for "clarity and certainty" in "the Eleventh Amendment's jurisdictional inquiry"); *Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002) ("jurisdictional rules should be clear"); *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004) ("[u]ncertainty regarding the question of jurisdiction is particularly undesirable"); *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) ("administrative simplicity is a major virtue in a jurisdictional statute"); *Lozman* v. *City of Riviera Beach*, 133 S. Ct. 735, 745 (2013) ("jurisdictional tests * * * should be as simple as possible" (internal quotation marks omitted)).

for the litigation in question does not prevent judgment on the merits from being final." 486 U.S. at 202 (emphasis added). It stressed that both "[c]ourts and litigants are best served by the *bright-line rule* * * * that a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Id.* at 202-203 (emphasis added).

While *Budinich* involved attorney's fees awarded under a statute, the rule it announced did not depend upon that fact and was not limited to such fees. On the contrary, both *Budinich*'s reasoning and its "sweeping language" show that its holding "applies with equal force where attorneys' fees are sought under a *contract*." *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197, 1199 (5th Cir. 1990). The "broadly-worded" decision provides no basis for the "strained" distinction "between fees authorized by [statute] and those authorized by contract." *United States ex rel. Familian Nw., Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 954-955 (9th Cir. 1994). Treating attorney's fees differently depending on whether they happen to arise under a statute or a contract (or some other source) would contravene the requirements of "consistency," "predictability," and "cl[arity]" in this jurisdictional context, and would lead to a rule that is neither "uniform" nor "bright-line." *Budinich*, 486 U.S. at 202.

Budinich demands a "practical approach." 486 U.S. at 202. Distinguishing between statutory and contractual fees is *not* practical. Indeed, it is unworkable—a fact that is particularly evident when one considers that the distinction cannot account, at least in any logical way, for cases in which a party

seeks attorney's fees under *both* a statute *and* a contract. This is not a fanciful scenario. In fact it is precisely what happened here: respondents sought fees both for "collecting payments due" under the collective bargaining agreement and as the prevailing party under ERISA. JA 74. That is an especially compelling reason to conclude that *Budinich*'s "uniform" and "bright-line" rule, 486 U.S. at 202, is just that, and to apply it to *all* awards of attorney's fees, "irrespective of the basis of the fee claim," 10 James W. Moore *et al.*, *Moore's Federal Practice* § 54.153[1], at 54-244 (3d ed. 2013).[4]

As Judge Easterbrook summed up the matter even before *Budinich* was decided:

> [F]ees provided by statute are [not] different from fees provided by contract. * * * [T]he source of the power to award fees does not matter. The finality of a decision depends on the kinds of issues the court determines, not on the source of authority for the court's decision. * * * [A] disposition of all claims on the merits is appealable, even though questions about fees remain. * * * This rule has the virtues of generality and certainty, which a good jurisdictional rule should. A rule turning on the source of the entitlement to fees would be far too uncertain.

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[4] In its order awarding respondents attorney's fees, the district court mentioned only ERISA as the basis for the award. Pet. App. 41a-42a. The First Circuit, in contrast, viewed respondents' entitlement to fees as "deriv[ing] from a contract rather than from a statute." *Id.* at 8a. That courts may be unable to agree even on what the basis of a particular fee award *was* is further confirmation that the statute-contract distinction is unworkable.

Exch. Nat'l Bank v. *Daniels*, 763 F.2d 286, 292-293 (7th Cir.), reh'g granted in part on other grounds, 768 F.2d 140 (7th Cir. 1985).

B. The Rule Adopted By The First Circuit Below—That A Contractual Fee Award Is *Sometimes* Collateral—Is Incorrect

In the decision below, the court of appeals adopted a rule that is based on an even *more* complicated distinction than that between statutes and contracts. The court determined that, while *all* awards of attorney's fees under a *statute* are collateral, *some* awards of fees under a *contract* are collateral and some are not. In particular, the First Circuit held that contractual fee awards are not collateral if they are part of the "merits" but collateral if they are not part of the "merits." The distinction between "merits" and "nonmerits" contractual fee awards is no more reconcilable with *Budinich* than the more general one between statutory and contractual awards. Nor is there any other justification for the First Circuit's rule.

1. The First Circuit held that a contractual fee award is sometimes collateral

In the decision below, the First Circuit joined the Third, Fourth, and Eighth Circuits in holding that "contractual claims for attorneys' fees may fall beyond the *Budinich* line." Pet. App. 6a. The First Circuit's version of that rule is that *Budinich* does not control when contractual fees are "an element of damages" and therefore "part of the merits of the[] contract claim." *Id.* at 8a-9a. Applying that rule here, the court of appeals analyzed the contract at issue, as well as respondents' claim under it, *ibid.*, and determined that, in this case, the attorney's fees are

damages and thus "beyond the line drawn by the *Budinich* Court," *id.* at 9a.

While the First Circuit believed that the Third Circuit "has put a foot in each camp," Pet. App. 7a, the better reading of that court's decisions is that it has adopted a rule that is similar (though not identical) to the First Circuit's. In the Third Circuit, an unresolved claim for attorney's fees is not collateral, and therefore prevents an otherwise final judgment from being final, if the requested fees are based on a contract and "an integral part of the contractual relief sought." *Gleason* v. *Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001). That court has characterized this rule as an "exception" to *Budinich*. *Local Union No. 1992 of Int'l Bhd. of Elec. Workers* v. *Okonite Co.*, 358 F.3d 278, 287 n.13 (3d Cir. 2004). It is true, however, that the Third Circuit has reached different results in applying the rule to the facts of particular cases.[5]

In the decision below, Pet. App. 8a, the First Circuit followed the Fourth Circuit's decision in *Carolina Power & Light Co.* v. *Dynegy Marketing & Trade*, 415 F.3d 354 (4th Cir. 2005), which held that an unresolved issue of contractual attorney's fees prevents an "order from being a final judgment" when the fees "would be awarded as part of the damages for [the] breach of contract claim." *Id.* at 360. Like the First Circuit, the Fourth Circuit analyzed "the contract be-

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[5] See, *e.g.*, *Vargas* v. *Hudson Cnty. Bd. of Elections*, 949 F.2d 665, 669-670 (3d Cir. 1991) (integral part); *Ragan* v. *Tri-County Excavating, Inc.*, 62 F.3d 501, 505 (3d Cir. 1995) (integral part); *Gleason*, 243 F.3d at 138 (not an integral part); *Am. Soc'y for Testing & Materials* v. *Corrpro Cos.*, 478 F.3d 557, 570 (3d Cir. 2007) (not an integral part).

tween the parties" and determined that, "[i]n the case before us," the attorney's fees were an element of damages and therefore not collateral. *Id.* at 359.

A concurring opinion in *Carolina Power & Light* articulated a narrower rule. The concurrence would treat a contractual fee award as collateral, not only when it is clearly and solely an award of "costs" to the prevailing party, but also when (1) the contract is "ambiguous" as to whether fees "are remedial, i.e., an element of damages, or, instead, are to be awarded to a prevailing party as costs of the underlying action" or (2) the contract suggests that "the attorneys' fees are a hybrid of both damages and costs." *Carolina Power & Light*, 415 F.3d at 363 (Wilkinson, J., concurring). Based on its own analysis of the contractual language, the concurrence determined that, "[i]n this case, the contract is perfectly clear that the attorneys' fees are a part of damages" alone and therefore not collateral. *Id.* at 362.

The Eighth Circuit has also held that contractual attorney's fees are not collateral, and fall outside *Budinich*'s "bright-line rule," if they "are substantively part of a plaintiff's compensatory damage" and thus "go to the merits of the claim." *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1047-1048 (8th Cir. 1991). The panel was divided, however, on whether the fees at issue in that case were of this type. Whereas the majority determined that the fees went to "the merits of [the] claim of breach of the contract," *id.* at 1048, the dissent, based on a different reading of the same record, believed that the fees related to "the contractual dispute that was tried in the District Court and with respect to which that court entered judgment," *id.* at 1049 (Bowman, J., dissenting).

2. The First Circuit's rule is inconsistent with *Budinich*

The rule adopted by the First Circuit below, and the identical or similar rules adopted by the Third, Fourth, and Eighth Circuits, are fundamentally at odds with *Budinich* and therefore wrong. As explained below, the rules are inconsistent with *Budinich* in two basic ways. First, they depend upon a distinction between "merits" and "nomerits" attorney's fees that *Budinich* categorically rejected. Second, they are difficult to apply and lead to different results in different cases, and thus are the very opposite of the uniform and bright-line rule that *Budinich* found necessary to ensure predictability and clarity in the application of 28 U.S.C. § 1291.

a. Budinich *rejects the distinction between "merits" and "nonmerits" attorney's fees*

According to the First Circuit, the "critical question" in deciding whether *Budinich* applies to contractual attorney's fees in a particular case is whether the claim for fees "is part of the merits." Pet. App. 8a. The circuits whose decisions the First Circuit followed said much the same thing.[6]

But *Budinich* squarely rejected the distinction between attorney's fees that are part of the "merits" and those that are not. 486 U.S. at 201. It explained

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[6] See *Gleason*, 243 F.3d at 137 (a claim for fees is not collateral when it is "part of the contractual damages at issue on the merits"); *Carolina Power & Light*, 415 F.3d at 362 (a claim for fees is not collateral when it "goes directly to the merits of the case"); *Justine Realty*, 945 F.2d at 1048 (a claim for fees is not collateral when it is "inherent in the merits of [the] claim").

that "preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits'" is not "of importance" under the "practical approach" that must be employed when considering issues of finality and appealability. *Id.* at 202. What *is* important, the Court made clear, is that "no interest pertinent to § 1291 is served," and that "significant interest[s]" are "disserved," by treating "merits" and "nonmerits" fee awards differently. *Ibid.* That "no distinction should be drawn" between such fee awards, moreover, was not some minor or inconsequential feature of *Budinich*; it was "[t]he central aspect" of the decision. 15B Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3915.6, at 329 (2d ed. 1992).

One of the circuits with which the First Circuit aligned itself has taken the position that treating contractual attorney's fees as collateral when they are "part of * * * the merits" would "frustrate [a] purpose[] of section 1291"—namely, "avoiding piecemeal appeals." *Justine Realty*, 945 F.3d at 1049; see also *Carolina Power & Light*, 415 F.3d at 362 ("whatever gains in predictability such a rule would bring would come only at the cost of an increased number of piecemeal appeals"). *Budinich* rejected that idea too. "[A]n appeal of merits-without-attorney's-fees when *** the attorney's fees [are deemed] part of the merits," the Court explained, "is no more harmful *** than an appeal of merits-without-attorney's-fees when [they are not]." *Budinich*, 486 U.S. at 202. The former is not "more disruptive of ongoing proceedings, more likely to eliminate a trial judge's opportunity for reconsideration, more susceptible to being mooted by settlement, or in any way (except nominally) a more piecemeal enterprise." *Ibid.*

At bottom, the First Circuit's decision reflects a fundamental misunderstanding of *Budinich*. The court of appeals believed that, although "attorney's fees *generally* should be considered a collateral matter" under *Budinich*, "they may *sometimes* be considered as part of the merits." Pet. App. 7a-8a (emphasis added). In fact that is the very *opposite* of what *Budinich* held. The whole point of *Budinich*'s "bright-line rule," 486 U.S. at 202, is that, precisely *because* attorney's fees *generally* are collateral, they *always* should be treated as collateral in determining whether a prior decision is final, *even though* attorney's fees *sometimes* are part of the merits. This Court *rejected* the argument that "the general status of attorney's fees for § 1291 purposes must be altered" when, as was assertedly the case in *Budinich*, the "law authorizing them" requires that they be treated as "part of the merits." *Id.* at 201. Yet that is the very premise on which the First Circuit's decision rests.

Indeed, in distinguishing between "merits" and nonmerits" attorney's fees, the decision below employed the very same reasoning as a court of appeals decision—*Holmes* v. *J. Ray McDermott & Co.*, 682 F.2d 1143 (5th Cir. 1982)—with which this Court expressed disagreement in *Budinich*, see 486 U.S. at 198, 201. Just as the First Circuit believed that the district court's initial decision was not final in this case because "the attorneys' fees must be considered an element of the plaintiffs' contractual damages," Pet. App. 8a, the Fifth Circuit in *Holmes* thought that the initial decision in that case was not final because "the award of attorney's fees to [the plaintiff] was an element of damages for [the defendant's] willful and arbitrary denial of maintenance and cure," *Holmes*, 682 F.2d at 1147, a right under the mari-

time law that is contractual in nature, see *Atl. Sounding Co.* v. *Townsend*, 557 U.S. 404, 422 n.9 (2009). Thus, *Budinich* not only rejected the "merits"–"nonmerits" distinction; it rejected a decision that drew that distinction, in a nonstatutory case, in precisely the way the First Circuit did here.

b.* Budinich *requires a clear and predictable rule

i. To determine whether attorney's fees are part of the "merits" or not, the First Circuit's rule demands a fact-intensive analysis of both the specific contract at issue and the underlying claim in each individual case. See Pet. App. 8a-9a. The same is true of the identical or similar rules applied by the Third, Fourth, and Eighth Circuits. See *Gleason*, 243 F.3d at 137-138; *Carolina Power & Light*, 415 F.3d at 359; *Justine Realty*, 945 F.2d at 1048.

But *Budinich* made clear that the finality of a decision should *not* have to be assessed on a case-by-case basis. It expressly *rejected* a rule that would "require[] the merits or nonmerits status *of each attorney's fee provision* to be clearly established before the time to appeal can be clearly known." *Budinich*, 486 U.S. at 202 (emphasis added). What was necessary instead, the Court said, was a "uniform" and "bright-line" rule, *ibid.*, of which the First Circuit's case-by-case approach is the antithesis.

ii. The First Circuit's rule is also difficult to apply. As one of the judges who joined the Fourth Circuit decision candidly acknowledged, contractual language "will often be ambiguous" as to whether attorney's fees are part of the "merits" or not, and it will sometimes suggest that fees "are a hybrid" of both "merits" and "nonmerits" relief. *Carolina Power*

& Light, 415 F.3d at 363 (Wilkinson, J., concurring).[7] More fundamentally, it is not at all apparent what the standard is for determining whether an award of contractual fees is a "merits" or "nonmerits" award in the first place.

In the decision below, the First Circuit found it "[p]ertinent[]" that respondents "sought recovery of both unpaid remittances and attorneys' fees" in their complaint, Pet. App. 3a, and that they "consistently have asserted an entitlement" to fees "[t]hroughout the litigation," *id.* at 8a-9a. The court did not explain, however, why the same request for fees could be a "nonmerits" request if made later in a litigation but a "merits" request if made earlier. It is hardly unusual, after all, for a plaintiff to allege an entitlement to *statutory* attorney's fees in a complaint, yet statutory fees indisputably are collateral under *Budinich*. Indeed, *Budinich* itself made clear that attorney's fees are collateral even when the plaintiff "specifically requested [them] as part of the prayer in his complaint." *Budinich*, 486 U.S. at 201.

The First Circuit also distinguished between fees for "collecting payments due" under the contract (which it deemed "merits" fees) and those for a "prevailing party" in the litigation (which it deemed "nonmerits" fees). Pet. App. 9a (quoting collective bargaining agreement). But the court did not say

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[7] Ironically, this judge's proposed solution to the problem was not to reject the rule adopted by the Fourth Circuit in favor of that of the Second, Fifth, Seventh, and Ninth, but rather to propose an even more complicated rule, according to which contractual fees must also be treated as collateral in "ambiguous or hybrid cases." *Carolina Power & Light*, 415 F.3d at 363 (Wilkinson, J., concurring).

whether that is a test for distinguishing "merits" from "nonmerits" fees or merely an example of the distinction. In any event, the distinction provides scant justification for departing from the "practical approach" of *Budinich*. 486 U.S. at 202.

For one thing, respondents would not have been entitled to recover the costs of "collecting payments due" under the collective bargaining agreement via this lawsuit, JA 26, if they had not prevailed in the litigation, because in that event the payments would not have been "due." Respondents thus were "able to satisfy the condition precedent to recovering legal costs—that is, that [petitioners] failed * * * to deliver [payments]—in exactly the circumstances in which [respondents] 'prevail[ed]' [on their] claim." *Carolina Power & Light*, 415 F.3d at 361-362. That means that, in a case of this type, there is at most a *conceptual* difference between "merits" and "nonmerits" contractual attorney's fees, not a practical one, and *Budinich* makes clear that "conceptual consistency" is not "of importance." 486 U.S. at 202.

Even before *Budinich*, Judge Easterbrook "reject[ed] as altogether too metaphysical the distinction between fees that are 'compensation for the injury' and those that are not." *Exch. Nat'l Bank*, 763 F.2d at 293. As he went on to explain: "All awards of fees make the prevailing party better off. Whether this benefit is 'really' a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation * * * is a question of semantics rather than substance." *Ibid.*

Moreover, in almost all cases, including this one, see JA 88-139; Br. in Opp. 5, the attorney's fees sought were "incurred mostly in connection with th[e] litigation," *Carolina Power & Light*, 415 F.3d at

360, and the "pre-litigation fees" were "minimal," *Justine Realty*, 945 F.3d at 1049. It is not practical—indeed, it is not *reasonable*—to treat one fee award differently from another for jurisdictional purposes, as the First Circuit apparently would, see Pet. App. 9a & n.4, simply because a small portion of the fees in one award but not the other was for work done before the complaint was actually filed.

In this connection, it bears mention that the Eighth Circuit believed that its position—and by extension that of the First Circuit—was consistent with *Budinich* because of this Court's "references to 'attorney's fees for the litigation,' 'attorney's fees for the litigation at hand,' 'attorney's fees for the litigation in question,' and 'attorney's fees attributable to the case.'" *Justine Realty*, 945 F.2d at 1048 (quoting *Budinich*, 486 U.S. at 199, 201-203). That is a curious basis for finding *Budinich* inapplicable, inasmuch as the great bulk of the fees in that case, as in this one, indisputably were "for the litigation." See *id.* at 1049; JA 88-139. Even the small amount of fees "for legal work performed before any formal litigation was commenced," Pet. App. 9a n.4, could be viewed as "for the litigation" in a case of this type, at least in certain circumstances, and at least in part, because "some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed 'on the litigation.'" *Webb* v. *Dyer Cnty. Bd. of Ed.*, 471 U.S. 234, 243 (1985); see, *e.g.*, *EEOC* v. *AutoZone, Inc.*, ___ F. Supp. 2d ___, 2013 WL 1277873, at *6 (D. Mass. Mar. 29, 2013) ("An attorney's zealous and robust representation of her client's interests in the early stages of a dispute may preempt the need to bring suit at all, an outcome that would inure to the benefit of all parties involved. Although litigation was not avoided here, it

would be imprudent to withhold from counsel an award of attorneys' fees for what can be rightly deemed services rendered to the benefit of the litigation.").[8]

The impracticability of the First Circuit's rule is proved by the fact that the Third Circuit has reached conflicting results in applying its even murkier "integral part of the contractual relief sought" test in different cases, and by the fact that judges of the Eighth Circuit came to different outcomes in the *same* case. See *supra* Point B.1. Because it is hard to apply, the First Circuit's rule—like the equally- or even-more-hard-to-apply rules of other circuits—severely undermines the core interests on which *Budinich* rests: "preservation of operational consistency and predictability in the overall application of § 1291," and the need for "[t]he time of appealability," which has "jurisdictional consequences," to "above all be clear." 486 U.S. at 202.

This Court reaffirmed the importance of clear jurisdictional rules just recently, and at considerable length, in *Hertz Corp.* v. *Friend*, 559 U.S. 77 (2010). There the Court said that "administrative simplicity is a major virtue in a jurisdictional statute"; that "[c]omplex jurisdictional tests complicate a case, eating up [the parties'] time and money"; that "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear

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[8] *Budinich* likely would *not* apply, however, to "attorney's fees from a *prior* litigation," *Familian*, 21 F.3d at 955 n.2 (emphasis added)—for example, when an attorney brings an action "against his client" for "fees earned" in an earlier matter, *Deus* v. *Allstate Ins. Co.*, 15 F.3d 506, 521 (5th Cir. 1994).

a case"; and that "[s]imple jurisdictional rules also promote greater predictability" for plaintiffs and defendants alike. *Id.* at 94. Each and every one of these considerations weighs heavily against the rule adopted by the First Circuit here.

3. Respondents' defense of the First Circuit's rule lacks merit

In defending the First Circuit's rule at the petition stage, respondents argued that the rule is consistent with *Budinich*, Br. in Opp. 25-29, and also relied on (a) this Court's decision in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), and (b) Rules 54 and 58 of the Federal Rules of Civil Procedure as amended in 1993, Br. in Opp. 29-35. We have already explained why the First Circuit's rule is *in*consistent with *Budinich*. As discussed below, the rule finds no support in *Osterneck* or the Rules of Civil Procedure either.

a. Osterneck *provides no support for the First Circuit's rule*

Osterneck held that a motion for discretionary prejudgment interest is a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), such that the judgment itself is not subject to appeal until the motion is acted upon. The decision distinguished *Budinich* on the ground that, unlike attorney's fees, which "as a general matter" are "not part of the merits" because they "are not part of the compensation for the plaintiff's injury," discretionary prejudgment interest "traditionally" has been "considered part of the compensation due plaintiff" and therefore part of the merits. *Osterneck*, 489 U.S. at 175. The rules adopted in the two cases thus were different because the general nature of attorney's

fees and prejudgment interest are different. *Osterneck* does not support the theory that either rule should give way if the traditional understanding of the relief does not apply in a particular case.

In fact *Osterneck* supports *our* position, not respondents', because the decision makes clear that the same rule for prejudgment interest—that it is not collateral—applies whether it is discretionary or available as a matter of right, even though as-of-right prejudgment interest is arguably collateral rather than part of the merits. *Osterneck*, 489 U.S. at 176 n.3. In explaining why the same rule applies, the Court quoted *Budinich*'s observations that "operational consistency" and "predictability" in the application of Section 1291 are more important than "conceptual consistency" in the status of a particular type of motion as "'merits' or 'nonmerits'" and that "[c]ourts and litigations are best served by the bright-line rule." *Ibid.* (quoting *Budinich*, 486 U.S. at 202). *Osterneck* thus makes precisely the same point as *Budinich*: that, whatever the rule for a specific type of relief (collateral or non-collateral), the rule should be the same whether the relief is deemed "merits" or "nonmerits" in a particular case.

b. Federal Rules of Civil Procedure 54 and 58 provide no support for the First Circuit's rule

Respondents have also advanced a complicated defense of the First Circuit's rule that the court of appeals itself did not employ. The theory relies upon two Federal Rules of Civil Procedure: Rule 54(d)(2)(A), which provides that "[a] claim for attorney's fees * * * must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages," and Rule 58(e),

which provides that, "if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may * * * order that the motion have the same effect * * * as a timely motion under Rule 59"—*i.e.*, that it delay the time for filing a notice of appeal until the motion is disposed of, see Fed. R. App. P. 4(a)(4)(A). These rules give district courts discretion, in an appropriate case, "to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits." Fed. R. Civ. P. 58 advisory committee's note (1993).

The premise of respondents' theory seems to be that, because Rule 58 refers to a "motion for attorney's fees * * * under Rule 54(d)(2)," and because Rule 54(d)(2) does not require a motion when the fees are an "element of damages," Rule 58 does not grant discretion to extend the time for an appeal when there is a pending request for fees that are an element of damages. Br. in Opp. 34 From that premise, respondents draw two conclusions: that there was "no need to address" such fees in Rule 58 because *Budinich* does not apply to them; and that, if *Budinich* did apply to them, they would be in "a procedural no-man's-land"—covered by "*Budinich*'s finality rule" but not by Rule 58's solution to "the problem of piecemeal appeals." *Ibid.* Respondents' premise is erroneous, and thus so too are their conclusions.

It is simply not true that, by virtue of its reference to Rule 54(d)(2), Rule 58 "does not address fees that constitute 'an element of damages.'" Br. in Opp. 34. Respondents apparently read Rule 54(d)(2) to say that fees that are an element of damages may not be sought by motion. But it does not say that. It

says only that they do not *have to be* sought by motion—presumably because fees that are truly an "element of damages" to be "proved at trial" will often if not ordinarily be awarded at the same time as other damages, particularly if the case is tried to a jury. See 10 *Moore's Federal Practice* § 54.151[2][d], at 54-240 (if fees are an element of damages, the motion requirement of Rule 54(d)(2) "is inapplicable" and fees "may not be sought *solely* by motion after judgment" (emphasis added)). If fees are not awarded at that time, however, nothing in the Rules prevents a party from filing a motion (together with a request for an order, if desired, that delays the time for appeal).

Far from being prohibited, a motion will often be necessary, because even fees that are supposedly part of the "merits" may consist mainly of fees for litigating the case (as they did here), thus requiring the party seeking fees to provide the district court with new information after the trial. Tellingly, respondents did just that, "fil[ing] a motion for attorneys' fees" post-trial. Pet. App. 3a; see JA 71-198; see also *Justine Realty*, 945 F.2d at 1045-1046 (same). There was thus nothing to prevent the district court from extending the time to appeal *in this very case*.

Had the 1993 amendments to the Federal Rules of Civil Procedure really been meant to modify *Budinich*'s "bright-line rule," 486 U.S. at 202, they would have done so directly and forthrightly, not in the roundabout way that respondents suggest. They would not have "hid[den] [an] elephant[] in [a] mousehole[]." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). That is one problem with respondents' theory. The other, as we have explained, is that it fails even on its own terms.

C. The Rule Adopted By The Eleventh Circuit—That A Contractual Fee Award Is *Never* Collateral—Is Also Incorrect

Like the First, Third, Fourth, and Eighth Circuits, the Eleventh Circuit has held that the rule of *Budinich*—that attorney's fees awards are collateral—does not apply to fees that are authorized by contract. Unlike those circuits, however, the Eleventh Circuit has held that contractual fee awards are *never* collateral.

In *Brandon, Jones, Sandall, Zeide, Koh, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349 (11th Cir. 2002) (per curiam), the Eleventh Circuit articulated its rule as follows: "In this Circuit, a request for attorneys' fees pursuant to a contractual clause is considered a substantive issue; and an order that leaves a substantive fees issue pending cannot be 'final.'" *Id.* at 1355. This rule applies to *all* contractual fee awards, even those that might be deemed collateral under the decisions of the First, Third, Fourth, and Eighth Circuits. *Adeduntan* v. *Hospital Authority of Clarke County*, 249 F. App'x 151 (11th Cir. 2007) (per curiam), for example, involved a contractual "prevailing party" provision, see *id.* at 153, yet the Eleventh Circuit concluded that the district court's decision on the merits was not final because the amount of fees had not been determined, *id.* at 152-155. Cf. *Gleason*, 243 F.3d at 137-138 (Third Circuit decision finding an award under a contract's "prevailing party" provision collateral).

In *Adeduntan*, the Eleventh Circuit said that it was "sympathetic" to the argument that its longstanding rule had been "undermined" by the "sweeping language" in *Budinich*, including this Court's adoption of a "bright-line rule," but felt

bound by its prior decision in *MedPartners*, which postdated *Budinich*. 249 F. App'x at 154 (quoting *Budinich*, 486 U.S. at 202). "For better or for worse," the Eleventh Circuit said, and "whether wrong or right," *MedPartners* "is binding panel precedent that we must follow," at least until "the Supreme Court[] decides otherwise." *Id.* at 154-155.

This Court should decide otherwise and make clear that *MedPartners* is wrong. For multiple reasons, the Eleventh Circuit's rule is at least as misguided as the First Circuit's.[9]

To begin with, the Eleventh Circuit's rule is inconsistent with *Budinich*. As we have explained, distinguishing between statutory and contractual attorney's fees undermines the need for "consistency and predictability" and the imperative that the time of appealability "above all be clear," and a rule that draws such a distinction is neither "uniform" nor "bright-line." *Budinich*, 486 U.S. at 202. The Eleventh Circuit's rule also cannot account for cases in which fees are sought under *both* a contract *and* a statute.

There is a further respect in which the Eleventh Circuit's rule is at odds with *Budinich*. Like the First Circuit's rule, it rests on a distinction between "merits" and "nonmerits" fees that *Budinich* expressly rejected—with the difference that *all* contractual fees are "merits" fees and all statutory fees (per *Budinich*) are not. See *Adeduntan*, 249 F. App'x at 153 ("the attorney's fees * * * are * * * part of the

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[9] Respondents have never advocated the Eleventh Circuit's rule, see Resp. C.A. Br. 18-25; Resp. C.A. Reply Br. 3-9; Br. in Opp. 25-35, and of course the court below did not adopt it. Nor has any other court.

merits of this case because they were awarded * * * based on a contract").

Finally, while *Budinich* made clear that "conceptual consistency" is not "of importance" in this context, 486 U.S. at 202, the Eleventh Circuit's rule cannot even claim that. On the contrary, the rule is completely arbitrary, because there is no reason to think—and the Eleventh Circuit has provided no evidence—that a particular contractual fee award is any more likely than a statutory fee award to be a "merits" rather than a "nonmerits" award (however that distinction might be drawn).

The Eleventh Circuit's rule is accordingly untenable, as that court itself all but acknowledged in *Adeduntan*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

No. 12-992

IN THE

Supreme Court of the United States

RAY HALUCH GRAVEL CO., *et al.*,

Petitioners,

v.

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

Whether a district court order is a "final decision" under 28 U.S.C. § 1291, even though it leaves unresolved a contractual damages claim for attorney's and auditor's fees and expenses, some of which were incurred long before the litigation commenced.

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IN THE

Supreme Court of the United States

No. 12-992

RAY HALUCH GRAVEL CO., *et al.*,

Petitioners,

v.

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS

STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

2. 28 U.S.C. § 2107(a) provides, in relevant part: "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

3. Federal Rule of Appellate Procedure 4(a)(1)(A) provides, in relevant part: "In a civil case, . . . the notice of appeal . . . must be filed with the district clerk within 30 days after entry of the judgment or order appealed from."

STATEMENT

This case involves two sets of contractual damages claims. One set of claims was for petitioners' failure to make certain required contributions under the collective bargaining agreement with respondent Union. The other was for petitioners' failure to pay the costs of collection that the contract required petitioners to pay if they failed to make the required contributions; those costs-of-collection claims sought attorney's and auditor's fees that were incurred beginning 22 months before the filing of the complaint. The district court decided the contributions claims in one order, and the costs-of-collection claims in a second order five weeks later. The notice of appeal was filed within 30 days of the second, but not the first, order. The question presented is whether the second order was the final order in this case, so that the notice of appeal was timely as to both orders.

Long-settled law under 28 U.S.C. § 1291 requires district courts to resolve all damages claims in a case before the court's judgment can become final and appealable. Thus, because the first order did not resolve both sets of damages claims, it was not final. That is particularly true because the costs-of-collection claims included auditor's fees, as well as attorney's fees, and it included claims for both kinds of fees incurred long before litigation was commenced.

This Court's decision in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), is not to the contrary, since it addressed statutory, not contractual, attorney's fees. While statutory fees have historically been viewed as "costs" separate from the merits, contractual fees—especially fees for non-attorney professionals such as auditors and fees that are not for the litigation at all—are "damages" indistinguishable from any other damages sought in a case. Such contractual damages claims are therefore a part of the merits of the case.

1. Petitioner Ray Haluch Gravel Company, Inc. ("Haluch"), has entered into successive collective bargaining agreements ("CBAs") with respondent International Union of Operating Engineers Local 98, AFL-CIO to obtain labor through the Union's non-exclusive hiring hall. Pet. App. 2a-3a. Under the most recent of those agreements, which became effective on May 1, 2005, Haluch was required to remit contributions to the respondent benefit funds on behalf of covered employees. J.A. 25-26, 29. Article VI of the CBA also provided that, in the event of Haluch's non-compliance, "[a]ny costs, including legal fees, of collecting payments due those Funds shall be borne by the defaulting Employer." J.A. 26.[1]

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[1] In addition, Section 3 of the Trust Agreement for respondent Local 98 Pension Fund authorizes the trustees of the Fund to take action to collect delinquent payments, and Section 5 authorizes them to require payment by an employer of "costs and expenses (such as . . . attorneys' fees . . .) incurred by the Trustees and arising out of the collection of such Employers' delinquent contributions." C.A. App. 381-382. The Trust Agreements for respondents Local 98 Engineers Joint Training Fund and Local 98 Health and Welfare Fund included the same

2. To ensure that employers remitted required contributions, respondents had a policy of conducting regular audits of employers' books and records, although an audit was sometimes initiated in response to a specific request from respondents. Pet. App. 27a ¶ 14; J.A. 57-58. In December 2007, respondents requested that outside auditors conduct an audit of Haluch to determine whether it was complying with the CBA. J.A. 60; C.A. App. 147-50. Haluch refused to provide access to a cash disbursement journal and a general ledger that were needed for the audit. C.A. App. 153-54. Because of Haluch's refusal, respondents retained Blitman & King in September 2008 as counsel to help obtain the withheld records. J.A. 81.

Between September 2008 and July 31, 2009, counsel for respondents worked to obtain the records that Haluch had refused to provide, so that the audit could be completed. Those efforts included negotiating with Haluch's counsel; researching fund auditing rights under the contract, ERISA, and state law; and communicating with the auditors. J.A. 81-85.

By July 31, 2009, the auditors were finally able to present a report on their audit for the period from January 1, 2005, to March 31, 2009. Pet. App. 27a; J.A. 85. The audit revealed that Haluch failed to remit required payments to respondents for work covered by the CBA,

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provisions. C.A. App. 394-396, 404-405. The Collections Policy of the Funds also provides that delinquent employers must pay attorney's fees and auditing fees incurred in collecting contributions, with the provision that those expenses must be paid regardless of whether legal proceedings are commenced. C.A. App. 412-413. Respondents based their claims in this case on all of these provisions.

on behalf of one identified employee and others who were not identified because Haluch did not keep records sufficient to identify them. Pet. App. 27a ¶ 13, 28a, 35a-36a; J.A. 85-87. On August 21, 2009, counsel drafted and sent a letter to Haluch, informing the company of its debt to respondents and requesting payment. J.A. 86-87. Respondents' counsel subsequently received a letter from opposing counsel on September 3, 2009, objecting to payment of the contributions. J.A. 87.

On September 25, 2009, respondents filed a complaint in the United States District Court for the District of Massachusetts. J.A. 30-55. The complaint alleged that petitioners had failed to remit contributions that were required by the contract, in violation of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, and the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141 *et seq.* J.A. 31. *See* 29 U.S.C. § 1145 (requiring employers to abide by the terms of CBAs that obligate them to remit contributions to a multiemployer plan). The suit sought damages consisting of the unpaid contributions, interest, certain statutory liquidated damages, and "costs and fees of collection and attorneys' fees." J.A. 38, 45, 48, 50, 52, 53, 54; *see* J.A. 40, 51 (seeking "costs and expenses of collection, audit fees and attorneys' and paralegal fees").

The attorney's fees for the period before September 25, 2009, when the complaint was filed, amounted to $5,018.75, plus some modest additional expenses. J.A. 81-88 (sum of "Amount" column).[2] The total

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[2] The additional expenses for copying and other disbursements are itemized at J.A. 142-45, 178, 184, and 186.

attorney's fees sought for the entire case were $126,912.30 for attorney and paralegal time plus $10,151.14 in expenses and disbursements. J.A. 75, 79. The auditor's fees for the period before the complaint was filed were $3,543, consisting of $1,366.50 for the period before counsel was retained, J.A. 64-65 (sum of final column through 3/21/08), and an additional $2,176.50 from the time counsel was retained until the filing of the complaint, J.A. 65-67 (sum of final column from 10/9/08 through 8/26/09). The total auditor's fees sought for the entire case were $6,537. J.A. 75.

3. On February 28, 2011, at the conclusion of a three-day bench trial, the district court asked the parties to submit proposed findings of fact and conclusions of law. Trial Tr. Vol. 3, at 50, Feb. 28, 2011; *see* Appendix 1a, *infra*. The court noted that "attorney's fees is part of the damages potentially." *Id.* The court then asked counsel for respondents:

> [D]o you want to include in your proposed findings of fact and conclusions of law, Mr. Wagner, your submission with regard to fees or do you want to wait to see if I find in your favor and submit the fee petition later on?

Id. Respondents' counsel stated, "We can submit the fee petition at that time." *Id.* at 51-52. The court replied, "Okay. So it will be the whole thing all at once." *Id.* at 52. On March 8, 2011, respondents requested that the time for submitting their request for fees and costs be extended to April 4, 2011, and the court granted the motion. C.A. App. 15-16.

On April 4, 2011, respondents submitted their request for $143,600.44 in total attorney's and auditor's fees and costs. J.A. 4, 72. Respondents' submission included a narrative of services as well as an affidavit from another local counsel attesting to the reasonableness of the fee request. J.A. 81-141, 196-98. All of the fees and expenses sought were "in connection with collection of the delinquent fringe benefit contributions, deductions, interest and liquidated damage[s]" under Article VI of the CBA. J.A. 79.

On June 17, 2011, the district court issued an order awarding respondents $26,897.41 on their claim that petitioners had failed to remit contributions due under the contract and stating that it would rule on attorney's fees in a separate memorandum. Pet. App. 38a. The court declined to award respondents the additional $156,988.54 in remittances (*i.e.*, contributions plus interest and other non-fees damages) that they sought. *Id.* at 35a. In the court's view, respondents were entitled to recovery only for work done by the one classified employee they could actually identify, but not for employees whose work respondents had argued was covered by the agreement but who could not be specifically identified. *Id.* at 37a-38a.

Five weeks later, on July 25, 2011, the district court issued an order awarding respondents $34,688.15 in attorney's fees and costs expended before and during the litigation, concluding that "[t]his case may now be closed." Pet. App. 47a. The court declined to award the full amount of fees sought, largely because respondents, having not recovered on their claims for delinquent contributions based on

work done by unidentified employees, had had limited success on the merits of their contributions claim. *Id.* at 46a-47a. But the court found that the audit fees and expenses respondents sought were "reasonable," and the court therefore included in its award the full amount of the $6,537 in audit fees and $10,151.14 in expenses that respondents sought. *Id.* at 47a n.1.

4. On August 15, 2011, respondents filed a notice of appeal seeking review of both the district court's July 25 order on attorney's fees and other collection expenses and its June 17 order resolving respondents' other claims. J.A. 199-203. The court of appeals *sua sponte* invited the parties to submit briefs on whether respondents' notice of appeal, which was filed within 30 days of the July 25 order but more than 30 days after the June 17 order, was timely as to both orders. J.A. 207; *see* 28 U.S.C. § 2107(a) (requiring notice of appeal to be filed within 30 days); Fed. R. App. P. 4(a)(1)(A). Because an appeal of a final judgment in a case brings all that precedes it before the court of appeals, *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994), the notice of appeal was effective to bring the June 17 order before the court of appeals only if the July 25 order, and not the June 17 order, was the final judgment in the case under 28 U.S.C. § 1291. There was no dispute that the July 25 order was properly before the Court.

a. The court of appeals held that the July 25 order was the final judgment under Section 1291 and therefore respondents' notice of appeal was effective as to both of the district court's orders. Pet. App. 9a, 18a. The court observed that in

Budinich, this Court had held that a district court's judgment that leaves open a *statutory* attorney's fees claim but resolves all claims on the merits is final, and therefore appealable, under 28 U.S.C. § 1291. *See* Pet. App. 6a. But the court noted that *Budinich* explained that "[i]f one were to regard the demand for attorney's fees as *itself* part of the merits, the . . . merits would then not have been concluded until the attorney's fee claim was resolved." *Id.* at 7a (quoting 486 U.S. at 200). In that event, "§ 1291 finality would not exist" until all such claims were resolved. *Id.* The court accordingly held that "[w]here, as here, an entitlement to attorneys' fees derives from a contract rather than from a statute, the critical question is whether the claim for attorneys' fees is part of the merits." *Id.* at 8a.

The court concluded that in this case "the attorneys' fees must be considered an element of [respondents'] contractual damages." Pet. App. 8a. It noted that respondents "brought suit . . . to enforce certain provisions of the CBA," which "provided for the payment of attorneys' fees as an element of damages in the event of a breach," and "[t]hroughout the litigation, [respondents] sought to recoup the attorneys' fees incurred as part of their collection efforts." *Id.* Because "[a] judgment as to liability that does not resolve the question of damages is not a final judgment within the purview of 28 U.S.C. § 1291," the district court's June 17 order regarding the unpaid contributions "was incomplete and the judgment was not final" until the district court resolved the attorney's fees claim in its July 25 order. *Id.*

The court rejected petitioners' argument that "under the CBA, only a prevailing party would be entitled to attorneys' fees and, thus, the case is on a par with *Budinich*." Pet. App. 9a. The CBA provided that "[a]ny costs, including legal fees, of collecting payments due [respondents] shall be borne by the defaulting [e]mployer." *Id.* The court explained that under that provision, "[t]here is no requirement that suit be brought, and, thus, there is no requirement that [respondents] be prevailing parties." *Id.* On the contrary, the CBA provision would apply if "a fund attempts to collect contributions from an employer, who, after a period of recalcitrance, yields to the fund's demands before suit is brought." *Id.* Indeed, in this case the fees sought "include remuneration for legal work performed before any formal litigation was commenced." *Id.* at 9a n.4.

b. On the merits of respondents' remittances claim, the court of appeals found that the district court's interpretation of the contract was "insupportable." Pet. App. 11a. The court explained that "the only reasonable interpretation [of the CBA] is that an employer must remit benefit payments for each hour of work covered by the CBA." *Id.* at 12a. The court also noted that "[t]he evidence presented in the [district court] indicates quite clearly that some covered work was done by unidentified employees." *Id.* at 13a. ERISA "requires an employer to document work covered by a collective bargaining agreement." *Id.* at 14a. The court accordingly held that Haluch's failure to keep records sufficient to document the precise number of covered hours worked and the specific identity of the employees who performed the work triggered a "presumption . . .

that [Haluch] is liable for all hours potentially representing covered work." *Id.* at 14a; *see id.* at 15a (noting that employers should not be able to evade responsibility for paying contributions by failing to keep records). The court remanded for further proceedings to determine "the amount of remittances owed on account of covered work performed by unidentified employees" under the correct legal standard. *Id.* at 17a.

c. With respect to respondents' fees claim, the court explained that "[t]he district court's fee calculation rested appreciably on [respondents'] lack of success in recovering remittances referable to unidentified employees." Pet. App. 17a. Because the district court would now be re-examining the merits of the claim for delinquent remittances, the court remanded so that the fee award could be "recalculated after the appropriate amount of unpaid remittances is determined." *Id.* at 18a.

SUMMARY OF ARGUMENT

I. Since the beginning of the federal judiciary, the final judgment rule has permitted appeals only from a final judgment that resolves all claims for damages in the case. That rule, which embodies the strong federal policy against piecemeal appeals, is a fundamental principle of federal appellate jurisdiction. A claim for fees under a contractual provision is a claim for liquidated damages; the provision is intended, like all enforceable liquidated damages provisions, to compensate the nonbreaching party for certain specific costs that party would incur as the result of the breach. Therefore, a district court judgment that fails to resolve a contractual fees claim,

like a district court judgment that fails to resolve any other damages claim, is not final.

This Court's decision in *Budinich* supports that conclusion. *Budinich* addressed a claim for *statutory* fees. As the Court explained, such fees were not designed to remedy the plaintiff's injuries and were regarded at common law (and in the text of most fee-shifting statutes themselves) as an element of "costs"—not damages—which have always been viewed as separate from the merits of a case. By contrast, claims for fees under *contractual* provisions are designed, like other claims for contract damages, to make the nonbreaching party whole, and have traditionally been viewed as claims for damages, not costs. Contractual fees are *not* properly viewed as "costs," because they are not authorized by statute but instead stand on the same footing as any other contract damages. Given those differences between statutory and contractual fees claims, the reasoning of *Budinich*, if applied to contractual claims, results in the conclusion that contractual fees claims are part of the merits and a judgment leaving them unresolved is not final and appealable.

Budinich also emphasized the need for predictability and clarity in jurisdictional rules. Accordingly, *Budinich* requires all claims for statutory fees to be treated as nonmerits "costs" claims, regardless of how they are characterized in the statute that authorizes them. The same need for predictability and clarity supports treating all contractual claims as merits-based damages claims, again regardless of how they are characterized in the

contract. That rule is easy to apply. Parties can be expected to inform courts of the statute or contract that provides the basis for their fees claims, and parties can determine if a court's judgment is final simply by seeing whether the court has resolved whatever contractual fees claims are in the case.

Petitioners' rule, by contrast, invites uncertainty. Petitioners' rule includes not only attorney's fees claims but also some other claims for professional fees, such as the auditor's fees sought under the costs-of-collection provision in the contract in this case. But petitioners offer no explanation for applying their rule to other, non-attorney professional fees, and they therefore offer no principled basis to determine which professional fees should be treated like the statutory fees that constituted "costs" in *Budinich*. Parties will be left to guess at the proper classification of such fees, at the risk of losing their right to appeal.

Finally, contrary to the core policies of the final judgment rule, petitioners' rule invites piecemeal appeals whenever a district court decides fees claims separately from other merits claims. By contrast, under respondents' rule, the court of appeals will hear the appeal of all issues in a case at once, without the need for any special procedures to join an appeal of a fees claim to an appeal of other damages claims in the same case. The parties, too, gain the advantages of efficiency, because they need prepare the appeal only once. Unnecessary appeals can be avoided because the parties will know the resolution of all issues in the case before deciding whether an appeal is necessary.

II. Recognizing that contractual fees claims are indistinguishable from other contractual damages claims for finality purposes is sufficient to resolve this case. But there is another, narrower ground that would equally resolve this case. Respondents sought damages under the contract's costs-of-collection provision for attorney's fees and auditor's fees that were incurred up to almost two years before the complaint in this case was filed. Many of those fees were for services that the auditors provided before attorneys were even retained, and both sets of professionals provided services before respondents even knew of the basis for the claims that were ultimately included in the complaint. As this Court's decisions and standard legal definitions make clear, nonmerits "costs" that are taxable to a party have never included such expenses that were incurred out of court and before litigation commenced. The rationale of *Budinich* itself was expressly based on the fact that statutory fee-shifting provisions commonly apply only to fees "for the litigation." *See, e.g.*, 486 U.S. at 199, 201. Because litigation commences with the filing of a complaint, and because parties seeking fees usually must itemize the services an attorney has provided in each billing period, drawing the line between litigation fees and nonlitigation fees will not be difficult.

Petitioners argue that the claims for thousands of dollars in nonlitigation auditor's and attorney's fees can be disregarded because they were a small proportion of the total fees that respondents sought. This Court, however, has consistently made clear that the final judgment rule requires disposition of *all* damages claims; there is no authority for varying the

application of the final judgment rule depending on the relative or absolute size of the claim left unresolved. Moreover, hinging the application of the final judgment rule on the relative or absolute size of the unresolved damages claim would invite precisely the uncertainty and unpredictability that this Court has rejected in the jurisdictional context. Because the district court's June 17 order did not dispose of respondents' nonlitigation claims for attorney's and auditor's fees that preceded the commencement of this litigation, the district court's judgment did not become final until it resolved those claims in its July 25 order. Because respondents' appeal was timely as to that order, the court of appeals correctly held that it effectively brought the entire case before that court.

ARGUMENT

I. UNDER 28 U.S.C. § 1291, A DISTRICT COURT ORDER THAT DOES NOT RESOLVE A CLAIM FOR FEES UNDER A CONTRACT IS NOT A FINAL JUDGMENT, BECAUSE IT LEAVES OPEN A CLAIM FOR CONTRACT DAMAGES

This case involves the application of the "final judgment" rule currently embodied in 28 U.S.C. § 1291, a statute whose meaning and nearly 225-year history of interpretation are barely mentioned by petitioners. Under that rule, a district court does not reach a final judgment from which appeal can be taken until it resolves all claims in a case on the merits, including the amount of damages due.

The contract in this case required petitioners to make certain contributions to respondents for work performed. Article VI of the contract required that

"any costs, including legal fees, of collecting payments due" to respondents "shall be borne by the defaulting Employer." J.A. 26. Article VI thus provided for a form of liquidated damages. Had the district court's June 17 order failed to assess the general expectation damages due to respondents for petitioners' failure to make the required contributions, it undoubtedly would not have been final and appealable. For exactly the same reasons, the absence from the June 17 order of a resolution of the liquidated damages claims under Article VI of the CBA kept that order from becoming final and appealable.

This Court's decision in *Budinich* addressed *statutory* attorney's fee claims. Such statutory claims have historically been viewed as costs, which are not intended to remedy the injury giving rise to the action. *Budinich* did not address contractual claims for attorney's fees, such as those at issue in this case, which have historically been viewed as damages and were included in the contract here precisely to compensate respondents for a part of their injury. Indeed, *Budinich*'s goal of certainty and predictability in jurisdictional provisions (*and* the important goal of consistency in the law) can be achieved only if all claims for contractual damages are treated alike, thus giving parties certainty that a district court's judgment is not final if any such claims remain open.

A. 28 U.S.C. § 1291, Which Permits Appeal Only Of "Final Decision[s]," Embodies Congress's Strong Policy Against Piecemeal Appeals

1. 28 U.S.C. § 1291 limits the jurisdiction of the courts of appeals to review of "final decisions" of the district courts. A final decision is one that "ends the

litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). While a final judgment need not be "the last order possible to be made in a case," *Mitchell* v. *Forsyth*, 472 U.S. 511, 524 (1985), if an order did not "end[] litigation on the merits, . . . § 1291 finality would not exist." *Budinich*, 486 U.S. at 200. In particular, "[t]he policy of Congress embodied in [28 U.S.C. § 1291] is inimical to piecemeal appellate review of trial court decisions." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

The final judgment rule has long been "a cornerstone of the structure of appeals in the federal courts." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306 (1962). Section 1291 descends from the First Judiciary Act, which limited the jurisdiction of the appellate courts to "final . . . judgments" of the district courts. Act of Sept. 24, 1789, § 22, 1 Stat. 84.[3] *See Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989). The "manifest intention of the legislature" was to "giv[e] appellate jurisdiction . . . upon *final* decrees only." *Canter* v. *Am. Ins. Co.*, 28 U.S. 307, 318 (1830) (Story, J.).

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[3] "[F]inal decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error. . . . And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court . . . be re-examined and reversed or affirmed in the Supreme Court." 1 Stat. 84.

2. This Court has rigorously enforced the final judgment rule and has repeatedly rejected proposed rules that would permit more than one appeal in a case, absent the most compelling justifications. For example, the "'collateral order' exception" applies to "a limited category of cases," *Hollywood Motor Car Co.*, 458 U.S. at 265, consisting of "district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equipment*, 511 U.S. at 867.[4] This Court has repeatedly emphasized, however, that this "narrow exception" should "never be allowed to swallow the general rule," *id.* at 868, and has frequently rejected claims that a given order is "collateral."[5]

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[4] Petitioners have never suggested that either of the district court orders in this case would have qualified under the "collateral order" exception. Aside from the fact that, as argued throughout this brief, both of the district court orders resolved issues that were part of the merits of the case, both orders were reviewable with no obstacle when the entire case was brought to the court of appeals on respondents' notice of appeal filed within 30 days of the latter of the two orders.

[5] Aside from some cases involving immunity or similar claims that a party is not subject to trial at all, *see, e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009); *Sell* v. *United States*, 539 U.S. 166, 177 (2003), the Court in recent years has rejected every claim that a trial court order is appealable under the collateral order doctrine. *See Mohawk Indus. Inc.* v. *Carpenter*, 558 U.S. 100, 103 (2009) (disclosure orders adverse to the attorney-client privilege); *Will* v. *Hallock*, 546 U.S. 345, 355 (2006) (denial of motion to dismiss under the Federal Tort Claims Act judgment bar); *Johnson* v. *Jones*, 515 U.S. 304, 307

B. Because Claims For Contractual Fees Are Damages Claims, A District Court's Judgment Is Not Final Until The Court Has Resolved Them

1. A key requirement of the final judgment rule is that a district court must resolve *all* claims for damages before its judgment can be final and appealable. "[T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up." *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948) (citations omitted). In *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958), for example, the district court adjudicated the liability issues and the damages due the plaintiff. *Id.* at 229. But because the plaintiff had sought prejudgment interest and the court's opinion "did not state facts necessary to compute the amount of interest to be included in the judgment," this Court held that the judgment was not final. *Id.* at 234. *See also Guarantee Co. of North America* v. *Mechanics' Sav. Bank & Trust Co.*, 173 U.S. 582, 586 (1899) (holding that district court decree was not final and appealable because the court had not "ascertain[ed] the amount for which the plaintiff was entitled to judgment and execution").

(1995) (order denying summary judgment on qualified immunity claim because unresolved issues of fact relating to the issue remained); *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 41 (1995) (denial of defendant's motion for summary judgment on the grounds that he was not a policymaker under 42 U.S.C. § 1983); *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994) (order refusing to grant motion to dismiss on ground that suit was precluded by settlement agreement).

2. That rule resolves this case. Because contractual attorney's fee clauses and costs-of-collection provisions provide for a type of liquidated damages, a court must resolve claims for fees based on such provisions, like all other claims for damages, before its judgment is final and appealable. *See Brandon, Jones, Sandall, Zeide, Koh, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349, 1355 (11th Cir. 2002) (per curiam) ("[A] request for attorneys' fees pursuant to a contractual clause is considered a substantive issue; and an order that leaves a substantive fees issue pending cannot be 'final.'").

a. "Damages" are defined as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Black's Law Dictionary* 445 (9th ed. 2009). "The fundamental principle that underlies the availability of contract damages is that of compensation." 24 *Williston on Contracts* § 64:1, at 7 (4th ed. 2002). Contract damages are intended to put the nonbreaching party "in as good a position pecuniarily as he would have been by performance of the contract." *Miller* v. *Robertson*, 266 U.S. 243, 257 (1924); *see* 24 *Williston on Contracts*, *supra*, § 64:1, at 7 (goal of damages is to place the plaintiff-promisee "in as good a position as he or she would have occupied had the defendant-promisor not breached the contract").

b. Liquidated damages provisions serve the general goal of contract damages. The parties have the "broad right to stipulate in their agreement the amount of damages recoverable in the event of a breach." 24 *Williston on Contracts*, *supra*, § 65:1, at 213. Although penalty provisions in contracts are not

enforceable, liquidated damages provisions are fully enforceable if they are limited to compensating the nonbreaching party in the event of a breach. *See* Restatement (Second) of Contracts § 356 (1981) ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss."); *see also Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151 (1956) ("Liquidated-damage provisions when reasonable are not to be regarded as penalties."). Accordingly, an unresolved claim for liquidated damages makes a district court's judgment on other damages issues nonfinal, just as any other unresolved claim for damages would.

c. A contractual enforcement provision providing for attorney's fees or costs of collection is "clearly in the nature of a liquidated damages provision." 24 *Williston on Contracts*, *supra*, § 65:23, at 323.[6] A nonbreaching party may suffer not only the direct costs of losing the breaching party's performance, but also the somewhat less direct costs of having to hire attorneys (or other professionals) and perhaps litigate in order to get the benefit of its bargain. An attorney's fee or broader costs-of-collection provision

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[6] In its provision entitled "Liquidated Damages and Penalties," the Restatement comments that "[a]lthough attorneys' fees are not generally awardable to the winning party, if the parties provide for the award of such fees the court will award a sum that it considers to be reasonable." Restatement (Second) of Contracts §356, cmt. d (1981).

is designed to address those somewhat less direct costs that may result from a breach.[7]

This Court has acknowledged that the "American rule," requiring parties to bear their own attorney's fees in litigation, can "be overcome by an enforceable contract allocating attorney's fees." *Travelers Cas. & Sur. Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 448 (2007) (citation omitted). As with other liquidated damages provisions, an attorney's fee provision (and, *a fortiori*, a broader costs-of-collection provision) represents an "estimat[e] in advance of any breach the damages the parties reasonably expect to result, thus protecting the parties against the risks of future litigation." 24 *Williston on Contracts*, *supra*, § 65:3, at 249-50. Indeed, were an attorney's fee provision not designed to cover reasonable costs caused by the breach, it would likely be viewed as a penalty clause and not be enforceable at all. *See id.* at 323 ("[I]f the amount is deemed to be penal, . . . the provision will be held unenforceable as a penalty."). Such attorney's fee and costs-of-collection pro-

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[7] Contractual attorney's fee and costs-of-collection provisions have sometimes been viewed as indemnification provisions, especially when the contract is worded in those terms. *See, e.g.*, *Mid-Hudson Catskill Rural Migrant Ministry* v. *Fine Host Corp.*, 418 F.3d 168, 177-79 (2d Cir. 2005) (Sotomayor, J.); *Columbia Plaza Corp.* v. *Security Nat'l Bank*, 676 F.2d 780, 790-791 (D.C. Cir. 1982); *Webster Drilling Co.* v. *Walker*, 286 F.2d 114, 117 (10th Cir. 1961); *Citizens Nat'l Bank of Orange* v. *Waugh*, 78 F.2d 325, 331 & n.1 (4th Cir. 1935). Any distinction between liquidated damages and indemnification, however, is of no consequence in this case. Indemnification claims, just like liquidated damages claims, are damages claims, part of the merits of the case, and must be resolved before a district court's judgment is final.

visions are commonplace in commercial contracts, promissory notes, mortgages, and other contracts. 11 *Corbin on Contracts* § 58.8, at 444-45 (rev. ed. 2005); 1 Robert L. Rossi, *Attorneys' Fees* § 9:1 (3d ed. 2013).

3. Because attorney's fee and costs-of-collection provisions simply provide for a form of liquidated damages, there is no basis to treat damages claims under such provisions any differently from any other damages claims arising from a contract. Under long-settled law, a district court's resolution of liability issues without resolving all damages issues, including liquidated damages, is not final and not appealable.[8]

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[8] Petitioners assert that respondents have never advocated this rule and that the court of appeals in this case did not adopt it. Pet. Br. 36 n.9. Regardless of how respondents' arguments below are viewed, *see* Resp. C.A. Reply Br. 1-2; Resp. C.A. Br. 18-25, respondents are permitted to make any argument in support of the judgment below. Petitioners framed the question presented as "whether a district court's decision on the merits that leaves unresolved a request for *contractual* attorney's fees is a 'final decision' under 28 U.S.C. § 1291." Pet. i. Having framed that broad question, petitioners could not argue that we are disabled from arguing that it should be answered in the negative.

The court of appeals neither adopted nor rejected the rule urged herein. Instead, the court held that the fees claims in this case had to be resolved before the district court's judgment could become final and appealable. Contrary to petitioners' assertions, *see* Pet.Br. 3, 13, 20-22, 30, the court's opinion, fairly read, did not rule one way or the other on the question whether that same principal would apply to *all* contractual fees claims.

C. *Budinich*'s Rule Applies To Statutory Fees, Which Are Costs, But Not Contractual Fees, Which Are Damages

This Court's decision in *Budinich* does not suggest that *contractual* attorney's fees must be treated as "costs" and therefore not part of the merits. On the contrary, the Court's reasoning in *Budinich* establishes that contractual attorney's fees claims, unlike statutory ones, are part of the merits of the case and must be resolved before a district court decision is final under Section 1291.

1. Budinich *involved a statutory fees claim.* *Budinich* involved a claim for attorney's fees under a Colorado statute providing that "in a suit to collect compensation from employment 'the judgment . . . shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action.'" 486 U.S. at 197. This Court held that the district court's judgment on employment compensation was final and appealable, even though it did not resolve the claim for attorney's fees. *Id.* at 203.

The Court in *Budinich* explained that the judgment was final because, "as a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain." 486 U.S. at 200. "Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action." *Id.* Moreover, "[a]t common law, attorney's fees were regarded as an element of 'costs' awarded to the prevailing party, which are not generally treated as part of the merits judgment." *Id.* (citation omitted). The Court also

noted that many federal statutes (like the state statute at issue in *Budinich*) confirm that classification, because they specify that attorney's fees "are to be taxed and collected as 'costs.'" *Id.* at 201. In short, *Budinich* was based on the distinction between "costs awarded to the prevailing party," which are "not part of the merits judgment," and "compensation for the plaintiff's injury," which is part of the merits judgment and therefore must be resolved before a judgment is final. *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 176-177 (1989).

2. *The rationale of* Budinich *establishes that contractual fees are not "costs," and must be resolved before final judgment.* All of the factors that supported the Court's rationale and decision in *Budinich* are true of typical fee requests under fee-shifting statutes, and it was therefore "indisputable" that a claim for such fees "is not part of the merits of the action to which the fees pertain." 486 U.S. at 200. But quite the contrary is true of contractual claims for fees, such as those at issue in this case. The Court had no occasion to address contractual fees claims in *Budinich*. If it had, however, its reasoning would have led to the conclusion that claims for contractual fees, unlike statutory fee requests, must be resolved before a district court's judgment can become final.

a. *Contractual attorney's fees are designed to make the nonbreaching party whole.* The Court in *Budinich* relied on the fact that statutory fees "do[] not remedy the injury giving rise to the action." 486 U.S. at 200. Contractual attorney's fee provisions, however, are designed to do just that. Like other liquidated damages provisions, contractual provisions

for fees or broader costs of collection represent the parties' effort to assess *ex ante* the costs of non-performance and make the nonbreaching party whole, even if those costs would not otherwise have been recoverable in the absence of the provision. Indeed, like other liquidated damages provisions, they would not be enforceable at all *unless* they reason-ably compensated the nonbreaching party for the injury suffered as a result of the breach. *See* pp. 20-22, *supra*.

b. *Contractual fees are not "costs."* Unlike statutory fees, contractual fees "[a]t common law" were *not* "regarded as an element of 'costs' awarded to the prevailing party, which are not generally treated as part of the merits judgment." *Budinich*, 486 U.S. at 200 (citation omitted). In England, at very early common law, litigation expenses if available at all were awarded as damages, not costs, and were intended to compensate the prevailing plaintiff. *See* Arthur L. Goodhart, *Costs*, 38 Yale L. J. 849, 851 (1929) (quoting 2 Frederick Pollock & Frederic William Maitland, *The History of English Law* 597 (2d ed. 1911)). After 1275, however, "[t]he common-law rule as to costs [was] based entirely on statute." *Id.*[9]

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[9] In 1275, the Statute of Gloucester made attorney's fees taxable as costs and awarded to prevailing plaintiffs. Arthur L. Goodhart, *Costs*, 38 Yale L. J. 849, 851-52 (1929); 6 Edw. I c. 1 (1275). In 1607, eligibility for costs was extended to prevailing defendants pursuant to the Statute of Westminster. *Id.* at 853; 4 Jac. I c.3 (1607); *see also Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 & nn. 7, 8 (1967). In 1875, the Judicature Act made the issue of costs an equitable and discretionary decision of the courts. Goodhart, 38 Yale L.J. at 854. Costs have since been governed by court rule in England. Charles T. McCormick, *Counsel Fees and Other Expenses*

Contracts accordingly did not provide the basis for awarding attorney's fees

"Costs" consist of a narrow category of litigation expense that is taxed to a party under statute or rule. This Court has defined "costs . . . in the context of lawsuits" as "those items of expense incurred in litigation that a prevailing party is allowed *by rule* to tax against the losing party." *United States* v. *Idaho ex rel. Dir., Dep't of Water Resources*, 508 U.S. 1, 8 (1993) (emphasis added).[10] *See Arlington Central Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297-98 (2006) (term "costs" in federal statute is a "term of art" that includes the express statutory authorization for "attorneys' fees as part of the costs," as well as "the list of otherwise recoverable costs . . . set out in 28 U.S.C. 1920").[11] In this Court, Rule 43 ("Costs")

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of Litigation as an Element of Damages, 15 Minn. L. Rev. 619, 620 (1931). The current rule is codified at CPR 44.

[10] While the Court in *Idaho* distinguished between "fees" and "costs," the "fees" the Court addressed were "those amounts paid to a public official, such as the clerk of the court, by a party for particular charges typically delineated by statute." 508 U.S. at 8. They thus did *not* include attorney's fees and they too, like "costs," were authorized by statute, not contract.

[11] 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily ob-

provides that "[t]he Clerk's fees and the cost of printing the joint appendix are the only taxable items in this Court," S. Ct. R. 43.3, and further addresses the procedural and other issues relating to costs.

In *Fleischmann Distilling*, the victorious plaintiff in a trademark infringement case sought an award of attorney's fees under a statute that authorized award of "the costs of the action" to successful plaintiffs. 386 U.S. at 715 n.1. The Court held that "costs" authorized by such a statute "do[] not include attorney's fees" (at least unless the statute specifically authorizes them). *Id.* at 720. Prior decisions of this Court had established that attorney's fees, if available at all in the absence of a statute or rule, were awardable "as an item of compensatory *damages* (not as a separate cost to be taxed)" or "as part of the fine to be levied on the defendant." *Id.* at 718 (emphasis added); *accord Roadway Exp., Inc.* v. *Piper*, 447 U.S. 752, 766 (1980) (holding that courts could shift attorney's fees as a penalty for bad-faith litigation conduct). Nonstatutory attorney's fees are awarded, if at all, as damages or a fine and therefore part of the merits of a case, not as nonmerits "costs."

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tained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

See also 28 U.S.C. § 1921 (U.S. Marshal's fees may be "tax[ed] as costs"); 28 U.S.C. § 1923 (same for certain docket fees).

The Court in *Fleischmann* relied in part on *Vaughan* v. *Atkinson*, 369 U.S. 527, 530 (1962), which held that a shipowner could be liable to a seaman for attorney's fees, as well as maintenance and cure. *Vaughan*, too, rested on the proposition that nonstatutory attorney's fees are damages, not "costs." As the Court explained in *Vaughan*, "[w]e do not have here . . . the usual problem of what constitutes 'costs' in the conventional sense," because "[o]ur question" about the award of attorney's fees "concerns damages." *Id.* at 530. In light of the shipowner's inexcusable failure to pay maintenance to the seaman, the Court concluded that "[i]t [was] difficult to imagine a clearer case of *damages* suffered for failure to pay maintenance than this one." *Id.* at 531 (emphasis added).

Attorney's fees, when provided for by statute, thus fit within the narrow category of litigation "costs," as *Budinich* held. Outside that narrow category of litigation expenses awardable as a matter of statute, however, contractual provisions allowing for attorney's fees—and, *a fortiori*, broader contractual costs-of-collection provisions allowing for fees that may or may not be for litigation—provide for the "damages" that a nonbreaching party may recover. Such provisions "reflect a willingness to award attorney fees to the plaintiff when the defendant should have protected the plaintiff from litigation or litigation costs." Dan B. Dobbs, *Law of Remedies: Damages, Equity, Restitution* § 3.10(3), at 286 (2d ed. 1993). Thus, "[w]hen recovery of a fee award is permitted because the adversary has breached a duty to protect against just such costs, the fee award is *damages*, not *costs*. One implication . . . is that stat-

utes and rules affecting *costs* thus have no bearing on such cases." *Id.*; *accord Security Mortgage Co.* v. *Powers*, 278 U.S. 149, 154 (1928) (applying state law in bankruptcy case and relying on proposition that "[m]any decisions of the courts of the state . . . hold that attorney's fees [under a note] are recoverable, not like costs as an incident of the suit, but as a part of the principal debt").

c. *Contracts do not typically provide that fees are to be taxed and collected as costs.* Finally, while *Budinich* noted that many fee-shifting statutes provide that attorney's fees "are to be taxed and collected as 'costs,'" 486 U.S. at 201, there is no basis for a similar conclusion about contracts. Whereas the term "costs"—or the common phrase "taxed as costs" or its variants[12]—is commonly used in statutes governing litigation and judicial procedure as a "term of art," *see Arlington Central Sch. Dist.*, 548 U.S. at 297, the

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[12] Indeed, the use of the common phrase "taxed as costs" and its variants—in contrast to the absence of a similar "taxed as damages" phrase—illustrates the difference between costs, which like other taxes must be provided for by statute, and damages, which are creatures of contract. The state statute at issue in *Budinich* used the term "taxed as part of the costs of the action." 486 U.S. at 197. Federal statutes and rules frequently use variations of the same phrase. *See, e.g.*, 28 U.S.C. 1828(c) ("A presiding judicial officer, in such officer's discretion, may order that all or part of the expenses shall be apportioned between or among the parties or shall be taxed as costs in a civil action."); 28 U.S.C. 1828(d); 28 U.S.C. 1875(d)(2) ("In any action or proceeding under this section, the court may award a prevailing employee who brings such action by retained counsel a reasonable attorney's fee as part of the costs."); *see also* Fed. R. Civ. P. 43(d) (court may "tax the compensation [for interpreters] as costs"); S. Ct. R. 43.3.

term "costs" in a contract is commonly used in its wider and ordinary meaning of "[t]he amount paid or charged for something; price or expenditure." *Black's Law Dictionary, supra,* at 397.[13]

The term "costs . . . of collecting payments" in Article VI of the contract here was plainly used in that everyday sense. When used simply to mean "expense," the term "costs" has nothing to do with the kind of court costs or litigation costs that, as noted in *Budinich*, have never been viewed as a part of the merits of a case. *See* 11 *Williston on Contracts, supra,* § 32:3, at 666-72 ("The plain, common, or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to them." (footnote omitted)). While statutes or rules define and allocate nonmerits litigation costs, a provision like Article VI provides for "[m]oney claimed by . . . a person as compensation for loss or injury," *Black's Law Dictionary, supra,* at 445, and it therefore provides for damages, not costs.

d. In short, the Court in *Budinich* was not addressing contractual fee provisions. *Cf., e.g., Hoffman Plastic Compounds, Inc.* v. *NLRB,* 535 U.S.

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[13] *See, e.g.,* 24 *Williston on Contracts, supra,* § 64:22, at 177 ("A subcontractor's damages for a delay in construction are ordinarily measured by the extent to which its *costs* are increased by the delay." (emphasis added)); *id.* § 64:2, at 25, 30-31 ("[A]ny *costs* that are avoided by the plaintiff not having to perform the balance of his or her own obligations under the contract, must be deducted from the recovery . . . Reliance damages are designed to compensate the plaintiff for any reasonably foreseeable *costs* incurred or expenditures made in reliance on the promise that has now been broken." (emphasis added)).

137, 159 (2002) ("'[L]anguage of an opinion' must be 'read in context' and not 'parsed' like a statute.") (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979)); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-133 (1944). This Court's caution that "[g]eneral expressions transposed to other facts are often misleading," *id.* at 133, is particularly apt in this case, where the rationale of *Budinich* points in precisely the opposite direction when *contractual* fees are at issue. While requests for statutory fees are treated just like other requests for costs and are not part of the merits of an action, claims for contractual fees seek a form of contractual damages designed "to remedy the injury giving rise to the cause of action." *Budinich*, 486 U.S. at 200. Accordingly, a district court's order that leaves unresolved such contractual claims, like an order that leaves unresolved other damages claims, is not final and appealable.

3. *Operational consistency and predictability.*

a. *Budinich* noted that "what is of importance" in jurisdictional rules "is not preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits,' but rather preservation of operational consistency and predictability in the overall application of § 1291." 486 U.S. at 202. Fee-shifting statutes with similar effect may vary in the extent to which they characterize fees as "costs" or "merits" or something in between. The need for predictability in jurisdictional statutes strongly supports the Court's determination that, regardless of how a particular statute is framed, fees under a fee-shifting statute are all to be treated as "costs." The failure to resolve claims for such fees accordingly

does not keep a district court's judgment from becoming final.

The same need for predictability supports treatment of *contractual* fees as damages (and therefore part of the merits), rather than costs. Parties can ordinarily be expected to inform the court of the legal basis for their fees claim, as they do for their other claims. If a party's claim for fees rests on a contract, the parties need only determine whether that claim has been resolved. If the district court has resolved the fees claim as well as the other claims, then the court's judgment is final. If not, then the court's decision is not final until it has resolved them. As was true of the statutory fees provision in *Budinich*, the precise terms of the contractual fees provision or its characterization of the fees does not matter because, however characterized, contractual fees are damages and must be resolved before appeal is authorized.

Indeed, although petitioners hardly seem aware of it, predictability is not the *only* value sought when construing a statute, such as 28 U.S.C. § 1291. Conceptual consistency is of importance as well. Under the rule advanced here, *all* claims for contractual damages are treated the same, regardless of whether they seek attorney's fees or other professional fees; fees for the litigation or nonlitigation fees; liquidated damages, ordinary expectation damages, special damages, or any other category of damages. The same cannot be said for petitioners' rule. See pp. 36-38, *infra*.

b. This Court in *Budinich* noted that "no interest pertinent to § 1291 is served by according different treatment to attorney's fees deemed part of the merits

recovery," because "an appeal of merits-without-attorney's-fees when there is a statute deeming the attorney's fees to be part of the merits is no more harmful to the trial process than an appeal of merits-with-attorney's-fees when there is no such statute." 486 U.S. at 202. As the Court explained, "[t]hat 'deeming' does not render the appeal more disruptive of ongoing proceedings, more likely to eliminate a trial judge's opportunity for reconsideration, more susceptible to being mooted by settlement, or in any way (except nominally) a more piecemeal enterprise." *Id.* Because finality "should not turn on the characterization of th[e] fees by the statute or decisional law that authorizes them," *id.* at 201, the Court was "not inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known." *Id.* at 202. Instead, a "uniform" rule was called for. *Id.*

In suggesting that this reasoning supports their position, *see* Pet. Br. 4, 13, 23-24, 26, petitioners mistake its import. In the quoted passages, the Court was making the point that the fact that most statutes characterize fees as costs and some characterize them as a part of the merits is of no consequence for finality purposes, especially because statues may not make the matter clear one way or the other. As the Court explained, "[t]he 'deeming' does not render the appeal more [or less] disruptive" of the interests underlying Section 1291. 486 U.S. at 202. Statutory fees provisions authorize costs, regardless of the characterization the statute uses (unless, of course, Congress has specifically addressed the issue of finality in the statute). Nothing in *Budinich*, however,

purported to depart from the long-settled principle that a district court must resolve all genuine merits claims before its judgment can be final and appealable, and *Budinich* did not "reject[] the 'merits'-'nonmerits' distinction." Pet. Br. 26. On the contrary, the reasoning in *Budinich* rested on that distinction, holding that statutory fees are always on the nonmerits (*i.e.*, "costs") side of the line.

The position advocated here follows logically from the reasoning in *Budinich*. The fact that a contract "deem[s]" fees to be part of the merits, or instead "deem[s]" them to be an element of costs, is of no consequence to the analysis, just as it has no bearing in the case of statutory fees. "[T]he merits or nonmerits status of each [contractual] attorney's fee provision," no matter how unclear or ambiguous it may be, need not be "clearly established before the time to appeal can be clearly known." 486 U.S. at 202. All that need be known is that the attorney's fee claim is based on a contract. That leads directly to the conclusion that resolution of such a damages claim is necessary before the district court's judgment will be final. The time for appeal will be clear.

c. Petitioners argue that this rule "cannot account for cases in which fees are sought under *both* a contract *and* a statute." Pet. Br. 36; *see* Pet. Br. 19-20. That is mistaken, because the disposition of the party's *contractual* fees claim alone will determine the time for appeal. If the district court has resolved all damages claims in the case, including the contractual fees claim, its judgment is final, regardless of whether the court has or has not disposed of the statutory fees claim. If the district court has not dis-

posed of the contractual claim, then its judgment is not final, again regardless of whether it has or has not disposed of the statutory claim. Although district courts will likely tend to dispose of both claims at once, the disposition of the contractual claim determines whether the district court has disposed of all damages claims in the case.

D. Petitioners' Rule Itself Fails To Provide Sufficient Clarity

Treating contractual fees claims just like other contractual damages claims provides both predictability and consistency. By contrast, petitioners' rule fails to do either. Indeed, in a case like this one, petitioners' rule requires litigants to risk their right to appeal on a guess as to whether the non-attorney professional fees sought in a case are, or are not, subject to petitioners' rule.

1. This case involves the finality of a district court order that left both attorney's fees *and* auditor's fees unresolved. The applicable contractual provision requires petitioners to pay the "costs, including legal fees, of collecting payments due" to respondents. J.A. 26. That provision expressly includes attorney's fees, and petitioners have never disputed that it covers auditor's fees as well. While the district court did not include the full amount of attorney's fees in its award, it did award all the auditor's fees that respondents sought. Pet. App. 47a & n.1.

Respondents first incurred auditor's fees in order to determine whether petitioners were complying with the CBA. J.A. 57-58. The auditors were hired to examine petitioners' records, including payroll books, tax returns, and ledgers to determine the

hours of work covered by the CBA. J.A. 58. The auditors could not complete their audit because petitioners refused to turn over needed records. C.A. App. 153-154. As a result, respondents retained counsel to help the auditors obtain the needed documents from petitioners. J.A. 81. The auditor's fees for the period from the beginning of the audit until counsel was retained in September 2008 amounted to $1,366.50. J.A. 64-65 (sum of final column through September 2008). Additional auditor's fees incurred after that date amounted to $5,170.50. J.A. 65-69 (sum of final column from October 2008 until end).

2. Under petitioners' rule, the June 17 order was final, even though it did not decide the claims for auditor's fees. Petitioners, however, offer no rationale for distinguishing auditor's fees from other unresolved damages claims that would undoubtedly prevent a decision from being final. Nor do they offer any explanation of whether all auditor's fees are subject to their rule, or, if not, which ones must be treated like attorney's fees.

Budinich provides no support for treating auditor's fees like attorney's fees. *Budinich* made no mention of auditor's fees and applied its rule only to "attorney's fees for the litigation." 486 U.S. at 199. And this Court has elsewhere held that fees for non-legal services like expert fees are *not* covered by the term "attorney's fees" in fee-shifting statutes unless, of course, Congress has expressly included them. *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 84, 102 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat.

1079, *as recognized in Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 251 (1994).

3. Petitioners' failure to distinguish between auditor's fees and attorney's fees creates substantial uncertainty. Parties faced with a variety of claims for damages based on professional fees would be left to guess whether a district court judgment that leaves those claims unresolved is, or is not, final. Moreover, the same confusion may arise with respect to claims of other professionals involved in contractual performance, such as accountants, architects, and others.[14] Petitioners' rule leaves the status of claims for those professional fees, too, entirely up in the air. Parties who guess wrong as to whether a particular professional fee is covered by petitioners' rule would risk the loss of their right to appeal.[15]

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[14] Courts have treated work by professionals other than lawyers as damages. For example, courts have held that accountant's fees, which may involve work similar to auditing, can be considered as damages, distinct from attorney's fees. *Caspe* v. *Aaacon Auto Transp., Inc.*, 658 F.2d 613, 617 (8th Cir. 1981); *Western Beef, Inc.* v. *Compton Inv. Co.*, 611 F.2d 587, 592 (5th Cir. 1980); *see also Carley Capital Grp.* v. *City of Newport News*, 709 F. Supp. 1387, 1399 (E.D. Va. 1989) (architect's fees).

[15] Petitioners' rule also requires litigants in some cases to risk their right to appeal on a guess as to whether the attorney's fees sought in a case are, or are not, subject to their rule. Some attorney's fees are sufficiently remote from the litigation costs of the case that they could not properly be treated as "costs" and must be treated as part of the merits of the case. Petitioners themselves hesitantly acknowledge that limitation when they state that "*Budinich likely* would *not* apply . . . to 'attorney's fees from a prior litigation.'" Pet. Br. 30 n.8. (first emphasis added) (quoting *United States ex rel. Familian Nw.*,

E. Petitioners' Rule Encourages Piecemeal Appeals And Disserves The Interests Underlying The Final Judgment Rule

1. A crucial element of the final judgment rule is a "strong bias . . . against piecemeal appeals." *Digital Equipment*, 511 U.S. at 872; *see Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940) ("Congress from the beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration."); *Hollywood Motor Car Co.*, 458 U.S. at 265. Describing the purposes of the final judgment rule, Justice Story explained that "[i]t is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final* decrees only, that causes should not come up here in fragments, upon successive appeals." *Canter*, 28 U.S. at 318.

Indeed, because the final judgment rule was "[d]esigned to avoid the evils of piecemeal review," *Republic Natural Gas*, 334 U.S. at 67, the Court has been careful not to "succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation," *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 440 (1985)

Inc. v. *RG & B Contractors, Inc.*, 21 F.3d 952, 955 n.2 (9th Cir. 1994)). Petitioners do not, however, explain where that line is to be drawn when some or all of the fees claimed are not for litigation at all, or when they are for investigation and resolution of issues or claims that may have been resolved or otherwise become unimportant to the instant litigation. See pp. 42-49, *infra*.

(citation and internal quotation marks omitted). The Court has "expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal." *Id.* at 439; *see Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988).

Exceptions to the general prohibition against piecemeal appeals are permitted in particular cases, under the provisions for partial final judgment under Fed. R. Civ. P. 54(b) and for interlocutory appeal under 28 U.S.C. § 1292(b) (2006). Those mechanisms would be available in attorney's fee cases, just as in other cases. Where the prerequisites for partial final judgment or interlocutory appeal are not met, however, the terms and policies of Section 1291 forbid piecemeal appeals.

2. The Court has identified a number of interests that are served by disallowing piecemeal appeals. First, piecemeal appeals discourage the independence of the trial judge and discredit "the special role that individual plays in our judicial system." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981).

Second, piecemeal appeals can lead to the "obstruction [of] just claims" by increasing the cost and length of the litigation. *Firestone Tire*, 449 U.S. at 374 (citation and internal quotation marks omitted); *see Canter*, 28 U.S. at 318 (piecemeal appeals "would occasion very great delays, and oppressive expenses"). "Most pretrial orders of district judges are ultimately affirmed," *Richardson-Merrell*, 472 U.S. at 434, and the same is no doubt true of post-trial orders as well; prolonging the appellate process is

therefore likely to increase the costs and delays of litigation. Precluding piecemeal appeals also reduces the costs of "wasteful losses of familiarity with the case by [the trial] court and perhaps counsel as well." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3907 (2d ed. 1992).

Third, the final judgment rule promotes "efficient judicial administration." *Firestone Tire*, 449 U.S. at 374 (citation omitted). If the parties are required to wait to raise issues until a final judgment has been rendered, the need to appeal may disappear altogether. The parties may settle the case, or the ruling at issue may in the end not affect the litigation sufficiently to warrant the expenses of appeal. Wright et al., *supra*, § 3907. Delaying the timing of appellate review also gives the district judge the opportunity to correct any error herself, obviating the need for appeal and preserving appellate resources. And it gives the appellate court access to a complete record, "which may well be useful to a complete understanding of the district court's findings on liability and damages." *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 177 (1989).

3. Treating contractual attorney's fee provisions like other contractual damages provisions avoids piecemeal appeals, and it thereby serves the crucial interests underlying the final judgment rule. The court of appeals has the opportunity to hear the appeal of the entire case in a single proceeding, after the district court has reached its last decision. The parties and the court of appeals need familiarize themselves with the case only once, and they avoid

the distraction of litigating in two courts at once. They incur the expense of preparing the record, writing their briefs, and preparing and presenting oral argument (if warranted) only once. No special procedural mechanism is necessary to combine two separate appeals into a single, sensible proceeding, because all issues will come to the court of appeals already tied together in a single package. Indeed, unnecessary appeals can be avoided, because the parties will be able to assess the impact of the district court's ruling on all of the damages issues in the case before having to decide whether an appeal is warranted. In an ordinary appeal, in which the district court's judgment is affirmed, the whole matter can be finally disposed of in a single appellate proceeding.

II. A DISTRICT COURT ORDER THAT LEAVES UNRESOLVED A CLAIM FOR NONLITIGATION FEES CANNOT BE A FINAL JUDGMENT

For the reasons given above, unresolved claims for contractual attorney's fees, like unresolved claims for other contract damages, prevent a district court order from becoming final and appealable under Section 1291. That principle is sufficient to resolve this case. There is, however, a narrower principle that would equally serve to resolve this case. Among the fees sought here were auditor's and attorney's fees for work done up to almost two years prior to the filing of the complaint. Those fees would not have been viewed as "costs" under any reasonable view of that term.

Unlike court costs, respondents' claims for those nonlitigation fees easily could have been brought as entirely separate and independent damages claims. Thus, regardless of the correct treatment of claims for attorney's fees "for the litigation" under *Budinich*, 486 U.S. at 199, there is no basis to treat respondents' claims for *non*litigation fees as anything but independent claims for contractual damages. Because the district court only resolved those claims in its July 25 order, there was no final judgment until it did so, and respondents' notice of appeal, which was filed within thirty days of that order, was timely.

A. Because The June 17 Order Did Not Resolve The Claims For Auditor's And Attorney's Fees That Were Not "For The Litigation," It Was Not A Final Judgment

1. The CBA gives respondents the right to "[a]ny costs, including legal fees, of collecting payments due." J.A. 26. Respondents sought fees under that provision of $1,366.50 for work performed by the auditors from November 2007 through March 2008, long before the attorneys were even retained in September 2008. Respondents also sought an additional $2,176.50 in auditor's fees for the period after the attorneys were retained but prior to the commencement of this suit. In addition, respondents sought $5,018.75, plus some additional expenses, in attorney's fees incurred from September 2008, until the complaint was filed on September 25, 2009. *See* p. 5, *supra*. These costs of collection were an integral part of respondents' damages claims from the beginning of this case. *See* p. 5, *supra*. The district court awarded respondents the full amount of the auditor's fees

and a portion of the attorney's fees (now subject to reconsideration on remand) that they sought. Pet. App. 46a-47a & n.1.

2. All of these pre-September 25, 2009, auditor's and attorney's fees and expenses were incurred and due under the contract before litigation commenced. They were not dependent on prevailing with respect to, nor even on instituting litigation for, the delinquent contributions. Pet. App. 9a & n.4. Indeed, as the court of appeals recognized, had respondents "attempt[ed] to collect contributions from [petitioners], who, after a period of recalcitrance, yield[ed] to [respondents'] demands before suit [was] brought," these amounts would be due with "no requirement that suit be brought" and "no requirement that [respondents] be prevailing parties." Pet. App. 9a. If petitioners had eventually paid the contributions prior to suit but persisted in withholding the nonlitigation auditor's or attorney's fees, respondents could have brought suit for those costs of collection alone, without any claim that further contributions were due.

3. Such nonlitigation expenses, consisting of attorney's and auditor's fees and expenses incurred up to twenty-two months before the litigation commenced and which began at a time when respondents had no ground to file its case for unpaid contributions, are damages, not "costs" in the sense that term is used in *Budinich*. As noted, *see* p. 26, *supra*, "costs . . . in the context of lawsuits" are limited to "those items of expense *incurred in litigation* that a prevailing party is allowed by rule to tax against the losing party." *United States* v. *Idaho*, 508 U.S. at 8

(emphasis added). Nonlitigation fees are not "costs," at least absent a statutory direction to the contrary.

Other standard legal definitions similarly make clear that the term "costs" refers only to expenses incurred in litigation. Aside from the ordinary use of "cost" simply to mean "an expense," *Black's Law Dictionary* gives two other definitions of the term "costs":

> 2. (*pl.*) The charges or fees taxed by the court, such as filing fees, jury fees, courthouse fees, and reporter fees. — Also termed *court costs*.
> 3. (*pl.*) The expenses of litigation, prosecution, or other legal transaction, esp. those allowed in favor of one party against the other. • Some but not all states allow parties to claim attorney's fees as a litigation cost. — Also termed (in sense 3) *litigation costs*.

Black's Law Dictionary, *supra*, at 397, 398. Attorney's fees for work begun, as here, up to a year before litigation is commenced and before the basis for the claims ultimately made is even known are not the kind of "charges or fees taxed by the court" or other "expenses of litigation," *id.*, that "are not generally treated as part of the merits judgment." *Budinich*, 486 U.S. at 200. And, *a fortiori*, claims for *auditor's* fees that were incurred and owed between eighteen and twenty-two months before the case was filed and before attorneys were even retained could not possibly be considered the kind of court or litigation costs that traditionally have been viewed as not a part of the merits of the case.

Budinich itself emphasizes that its rule applied to attorney's fees "for the litigation." The Court noted that "[t]he question before us . . . is whether a decision on the merits is a 'final decision' . . . under § 1291 when the recoverability or amount of attorney's fees *for the litigation* remains to be determined." 486 U.S. at 199 (emphasis added); *see id.* at 201 (concluding that the "§ 1291 effect of an unresolved issue of attorney's fees *for the litigation at hand* should not turn upon the characterization of those fees by the statute or decisional law that authorizes them" and adopting "a uniform rule that an unresolved issue of attorney's fees *for the litigation in question* does not prevent judgment on the merits from being final") (emphasis added). *Budinich*'s rationale is not based on any conclusion about contractual attorney's (or auditor's) fees, such as those here, which were in no sense "for the litigation."

This Court's decision in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), also rested on the proposition that litigation costs are not a part of the merits of a case, while nonlitigation fees and other expenses are. The plaintiff in *Steel Co.* argued that it had standing because, if it prevailed in the suit, it would be entitled to attorney's fees and nonlitigation investigative expenses under the governing statute. *Id.* at 107. The Court addressed the litigation and nonlitigation fees and expenses separately. The Court rejected the argument that standing could be based on a claim for litigation costs, precisely because an "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists *on the merits* of the underlying claim." *Id.* (omission in original and emphasis added)

(quoting *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990)). In keeping with long-settled law, no case or controversy "on the merits" exists when the only issue is a claim for litigation costs. By contrast, the Court held that "[t]he recovery of [investigative] expenses unrelated to litigation would assuredly support Article III standing." *Id.* at 107-108.[16] It rejected that basis for standing only on the ground that the statute under which the plaintiff sued did not authorize recovery of such expenses. *Id.* at 108. For the same reason as in *Steel Co.*, the nonlitigation auditor's and attorney's fees sought here were clearly part of the merits of this case.

In short, the mere fact that attorney's (or auditor's) fees, rather than some other form of expense, are sought in a claim for contract damages has never had, and should not have, any effect on the application of the final judgment rule of Section 1291. Regardless of the treatment of the fees for the period beginning with the commencement of litigation, respondents' claims for nonlitigation fees for auditors and attorneys that respondents incurred before the complaint was filed cannot be distinguished from any other claim for breach of contract. Accordingly, the fact that respondents' claims for the nonlitigation fees remained unresolved until the district

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[16] The nonlitigation expenses in *Steel Co.* were "for the investigation . . . of this matter." 523 U.S. at 105. They were considered "unrelated to litigation," *id.* at 107-108, in the sense that they were not for the litigation itself. But those expenses were incurred for investigative efforts that ultimately led to the filing of the complaint, just like the nonlitigation auditor's and attorney's fees sought here for contract compliance and investigative efforts.

court's July 25, 2011, order meant that there was no final judgment in the case until that date. *See, e.g.*, *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1047-48 (8th Cir. 1991).

4. The Court in *Budinich* did not directly address the question whether its rule applied to nonlitigation fees if authorized by statute. But if its rule does extend that far, the justification is in the statute that authorizes the fees. Statutes and rules have always defined the limits of nonmerits "costs." The teaching of *Budinich* is that a fee-shifting statute builds on that tradition when it authorizes attorney's fees, and the statutory definition of the fees allowed—perhaps within some limits—therefore defines the scope of the nonmerits "costs" in the case.

It is our submission above that, while Congress defines what types of expenses are nonmerits "costs," private parties have no such authority; their contracts instead determine damages and thereby determine what constitutes the merits of a case. *See* pp. 15-42, *supra*. But even if private parties could exercise that legislative authority by defining in a contract what constitutes nonmerits "costs," their authority would be limited to the types of litigation expenses that come within the traditional category of "costs." Private parties do not have the authority that would be needed here: to convert *non*litigation expenses into costs simply by allocating their burden in a contract. At least in the absence of express legislative authority, if private parties provide in a contract for *non*litigation expenses to be paid to the nonbreaching party in the event of a breach, they have by definition and long tradition provided for

damages, not costs. *Black's Law Dictionary*, *supra*, at 445.

5. The line between nonlitigation fees and litigation fees is drawn at the commencement of litigation, and drawing the line there provides the "operational consistency and predictability" that is important in jurisdictional rules. *Budinich*, 486 U.S. at 202. *United States* v. *Idaho* defined costs as expenses "incurred in litigation." 508 U.S. at 8; *see also Budinich*, 486 U.S. at 201 ("for the litigation at hand"). The line in *Steel Co.* too appears to have been drawn at the commencement of litigation. The definitions from *Black's* quoted above are largely to the same effect. Moreover, all of the categories of expense included in 28 U.S.C. § 1920 and related statutes, which define "costs" for purposes of federal litigation, are based on expenses incurred in litigation, not expenses incurred before litigation commenced. *See* pp. 25-29, *supra*. Thus, while expenses incurred in litigation may be viewed as "costs," expenses incurred in investigation, negotiation, counseling, and other activities before litigation commences—and, especially, expenses incurred for paying non-attorney professionals before attorneys were even retained, as was true of the auditor's fees here—do not fit within that category. Drawing a line at the commencement of litigation is true to the traditional conception of "costs" and provides parties with a clear guidepost for determining when a final judgment has been reached.[17]

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[17] If there were any doubt about where to draw the line with respect to attorney's fees, at the very least it would remain clear that expenses incurred to retain non-attorney profession

B. Petitioners Err In Dismissing The Nonlitigation Fees As Irrelevant

1. The court of appeals rested its reasoning in part on the fact that contractual fee provisions like the one in this case frequently allow parties to claim nonlitigation fees as damages. Pet. App. 9a. In the Brief in Opposition, we further emphasized this point. *See, e.g.*, BIO 10-11, 13-14, 20-22, 27-29. Petitioners' primary response is that in this case the fees were "incurred *mostly* in connection with th[e] litigation," Pet. Br. 28 (emphasis added, alteration in original, and citation omitted), and that "[i]t is not practical—indeed, it is not *reasonable*—to treat one fee award differently from another for jurisdictional purposes . . . simply because a small portion of the fees in one award but not the other was for work done before the complaint was actually filed." *Id.* (citation omitted); *see also id.* ("small amount of fees"). Petitioners are mistaken.

Because respondents' claims for thousands of dollars in nonlitigation fees are claims for damages, the district court's failure to resolve those claims kept its June 17 order from being final and subject to appeal. The fact that only "a small portion of the fees" is involved in those claims, or that respondents' fees claims are "mostly" for litigation fees, is of no relevance in the application of the final judgment rule.

Petitioners cite no authority, and respondents are aware of none, for the proposition that the relative or absolute size of the claim left unresolved has anything

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als long before attorneys were retained, such as the auditors in this case, are damages, not costs, and must be resolved before a judgment is final.

to do with whether the district court's judgment is final. As this Court has held, "the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up." *Republic Natural Gas*, 334 U.S.at 68.[18]

Moreover, petitioners throughout their brief urge the need for a "bright-line rule," Pet. Br. 2, 11, 12, 14, 18, 19, 23, 25, 26, 32, 36. The lines we would draw—whether between contract and statute, or between fees incurred in litigation and fees incurred before the litigation commences—are clear. But it is difficult to see the brightness of the line petitioners urge between a claim for a "small amount of fees," Pet. Br. 29, that can be disregarded for finality purposes and a claim for a slightly larger amount of fees that would prevent the district court's judgment from becoming final.

2. Petitioners' only other response is a brief and exceptionally qualified comment that the claims in this case for fees from the period before the complaint was filed "*could* be viewed as 'for the litigation' in a case *of this type*, at least *in certain circumstances*, and *at least in part*, because 'some of the services performed before a lawsuit is formally com-

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[18] Only "if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate," may a judgment be "regarded as concluding the case and . . . immediately reviewable." *Republic Natural Gas*, 334 U.S. at 68 (citations omitted); *see Gospel Army* v. *Los Angeles*, 331 U.S. 543, 546 (1947); *Mower* v. *Fletcher*, 114 U.S. 127, 128 (1885); *S.E.C.* v. *Carrillo*, 325 F.3d 1268, 1269 (11th Cir. 2003); *Rekstad* v. *First Bank Sys. Inc.*, 238 F.3d 1259, 1262 (10th Cir. 2001); *Kosnoski* v. *Howley*, 33 F.3d 376, 379 (4th Cir. 1994).

menced by the filing of a complaint are performed 'on the litigation.'" Pet. Br. 29 (emphasis added) (quoting *Webb* v. *Bd. of Educ.*, 471 U.S. 234, 243 (1985)). Of course, the dispositive question is whether in *this* case in *these* circumstances the district court's failure to resolve respondents' fees claims *in full* in its June 17 order kept that order from being final and appealable. Some of respondents' contractual claims for nonlitigation auditor's and attorney's fees date from, and were petitioners' legal obligation, almost two years before the complaint was filed. Even if petitioners were correct that fees for the litigation itself should be treated differently from other forms of contract damages under Section 1291, the claims for nonlitigation fees in this case would not fall within that rule. Because the district court's June 17 order did not resolve them, it was not final and appealable.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 23, 2013

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CIVIL NO. 09-11607-MAP

BEFORE THE HONORABLE MICHAEL A. PONSOR, DISTRICT JUDGE, NON-JURY TRIAL, VOLUME 3, HELD ON FEBRURAY 28, 2011

[51] * * * * *

THE COURT: * * * * * I'm prepared to set 3/14 as the same day for submission of proposed findings of fact and conclusions of law if that is not going to bear down on you too heavily.

Is that enough time for you to put those together?

MR. CAHILLANE: It's fine with me, Your Honor.

THE COURT: All right. So same day, 3/14, plaintiff's and defendant's proposed findings and conclusions.

At that point the decision will go under advisement and I will do one of two things. I will either set the case for argument or I will simply rule on the papers.

I have one other point I want to touch on. Under our rules ordinarily once judgment comes down, if there's a judgment for the defendants, then obviously this is not something that we have to address, but

if there is a judgment for the plaintiffs, typically a motion for attorney's fees can be filed within 30 days thereafter.

On the other hand, attorney's fees is part of the damages potentially here. So do you want to include in your proposed findings of fact and conclusions of law, Mr. Wagner, your submission with regard to fees or do you want to wait to see if I find in your favor and submit the fee petition later on?

MR. WAGNER: We can submit the fee petition at [52] that time, Your Honor.

THE COURT: Okay. So it will be the whole thing all at once. All right.

* * * * *

REPLY BRIEF

No. 12-992

In the Supreme Court of the United States

RAY HALUCH GRAVEL CO., ET AL.,

Petitioners,

v.

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), this Court held that an award of attorney's fees was collateral, such that an earlier decision on the merits was a "final decision" under 28 U.S.C. §1291. The fees in *Budinich* were awarded under a statute. The Court granted certiorari in this case to resolve a circuit conflict on whether the same rule applies to attorney's fees awarded under a contract. Four circuits have held that a contractual fee award, like a statutory award, is *always* collateral, while four others—including the First Circuit below—have held that a contractual award is *sometimes* collateral, depending on whether it is a "merits" or "nonmerits" award. Only one circuit, the Eleventh, has held that, while a statutory fee award is always collateral, a contractual award *never* is.

The Eleventh Circuit thus disagrees with all the other circuits to have considered the question. And even that court has expressed doubt about the correctness of its rule, acknowledging that it was "sympathetic" to the view that the rule is inconsistent with *Budinich* and the "bright-line rule" this Court adopted. See Pet.Br.35-36.

Remarkably, in a case in which a First Circuit decision is under review, respondents do not defend that court's own rule, effectively conceding that it is incorrect. Respondents instead ask this Court—for the first time in the litigation, including the certiorari stage—to adopt the outlier Eleventh Circuit rule, which has been endorsed by no other court and barely has the support of the Eleventh Circuit itself. That is telling evidence that the rule we advocate is correct.

At bottom, the Eleventh Circuit's rule is wrong for the same reasons that the First Circuit's rule is wrong: it relies on a distinction between "merits" and "nonmerits" attorney's fees that *Budinich* expressly rejected; and, unlike the rule adopted in *Budinich*, it is neither a "uniform" nor a "bright-line" rule.

Respondents' principal defense of the Eleventh Circuit's position is that different rules for statutory and contractual attorney's fees are justified because all statutory fees are "nonmerits" fees and all contractual fees are "merits" fees. That is demonstrably erroneous. *Budinich* itself recognized that some statutory fees can be "merits" fees—and refused to treat them differently from "nonmerits" fees. Indeed, some statutory fee provisions look very much like the contractual provision at issue here. Conversely, many contractual fees are generally regarded as "nonmerits" fees, the most obvious being fees awarded to a "prevailing party." Respondents themselves said as much at the petition stage.

Respondents also defend the Eleventh Circuit's rule on the grounds that it avoids "piecemeal appeals" and provides more "clarity" than our rule. But this Court already rejected the former argument in *Budinich*. As to the latter, no rule could be clearer than that attorney's fee awards are collateral regardless of their source or characterization.

Finally, as an alternative basis for affirmance, respondents advocate a narrower rule: that, even if *Budinich* applies to contractual as well as statutory fees, it does not apply to either when the requested award includes "nonlitigation" fees, no matter how insignificant the amount. This fallback rule is no more consistent with *Budinich* than the First or Eleventh Circuit's rule. By substituting a "minimal-

ly nonlitigation"-"totally litigation" distinction for a "merits"-"nonmerits" distinction, it simply replaces one case-by-case, fact-intensive, and hard-to-apply rule with another.

A. The Eleventh Circuit's Rule Is Incorrect

The rule applied by the Eleventh Circuit—that statutory attorney's fees are always collateral and contractual fees never are—should be rejected because (1) it is irreconcilable with *Budinich* and (2) respondents offer no persuasive defense of it.

1. The Eleventh Circuit's rule is inconsistent with *Budinich*

a. The holding of *Budinich* rested on the need for "operational consistency and predictability" in the application of Section 1291 and the imperative that the time of appealability "should above all be clear." 486 U.S. at 202. *Budinich* thus rejected the view that there should be one rule for attorney's fees characterized as "part of the merits" by the "law authorizing them" and another rule for "nonmerits" fees. *Id.* at 201-202. Instead, it adopted a "uniform" and "bright-line" rule, *id.* at 202: that a decision leaving unresolved a request for attorney's fees is *always* final.

As our opening brief explains (at 23-31), the First Circuit's rule—according to which decisions that postpone a ruling on contractual attorney's fees are sometimes final and sometimes not, depending on the particular facts of the case—is inconsistent with *Budinich* because it (i) rests on a distinction between "merits" and "nonmerits" fees and (ii) is neither "uniform" nor "bright-line." Although respondents defended the First Circuit's rule at the petition stage, see Opp.25-29, they do not do so now, and instead

urge adoption of the Eleventh Circuit's rule. But the Eleventh Circuit's rule is inconsistent with *Budinich* for the same reasons.

As to the first, the sole difference between the Eleventh Circuit's rule and the First Circuit's is that they take a different view of what constitutes a "merits" award. Whereas the First Circuit treats only *some* contractual attorney's fees as "merits" fees, the Eleventh Circuit treats *all* contractual fees that way. But both circuits—unlike this Court in *Budinich*—rely on a distinction between "merits" and "non-merits" fees.

As to the second reason, the only difference between the Eleventh Circuit's rule and the First Circuit's is that—because of their different views of what constitutes a "merits" fee—they draw different lines between cases subject to one rule and those subject to another. Whereas the First Circuit applies one rule to all fees awarded under a statute and some fees awarded under a contract, and a different rule to other fees awarded under a contract, the Eleventh Circuit applies one rule to all fees awarded under a statute and a different rule to all fees awarded under a contract. But both circuits—unlike this Court in *Budinich*—apply one rule to one category of attorney's fees and a different rule to another. Neither circuit applies a "uniform" or "bright-line" rule.

b. Respondents insist that the line the Eleventh Circuit draws—"between contract and statute"—*is* a bright-line rule. Resp.Br.51. But the subject here is attorney's fees, not attorney's fees authorized by a particular source of law. "[T]he source of the power to award fees does not matter. The finality of a decision depends on the kinds of issues the court deter-

mines, not on the source of [its] authority ***." *Exch. Nat'l Bank* v. *Daniels*, 763 F.2d 286, 293 (7th Cir.) (Easterbrook, J.), reh'g granted in part on other grounds, 768 F.2d 140 (7th Cir. 1985). A "bright-line" rule therefore means that all attorney's fees are to be treated alike.

Budinich itself makes clear that its rule is "bright-line" in exactly the sense that it does *not* depend upon "the merits or nonmerits status" of each fee award. *Budinich*, 486 U.S. at 202. But that is just what the Eleventh Circuit's rule depends upon. Even if a contract-versus-statute rule could be thought to be a "bright-line" rule in some *other* sense, therefore, it is manifestly not "bright-line" in the sense that is relevant here.

Treating attorney's fees authorized by statute differently from those authorized by contract is no more a "bright-line" rule than treating one form of prejudgment interest differently from another. And this Court decided in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 176 n.3 (1989), that two types of prejudgment interest—mandatory and discretionary—should *not* be treated differently for purposes of determining the finality of an earlier decision. On the contrary: quoting *Budinich*, *Osterneck* made clear that it was precisely because of the *need* for a "bright-line rule" that the two types of prejudgment interest should be treated *identically*. *Ibid.* The same is true of the two types of attorney's fees at issue here.

c. Respondents also insist that *Budinich* "did not reject" the "merits"-"nonmerits" distinction. Resp.Br.35 (internal quotation marks and brackets omitted). They interpret the decision to mean that "statutory fees are *always* on the nonmerits *** side

of the line," irrespective of "the characterization the statute uses." Resp.Br.34-35 (emphasis added). The implication seems to be that the merits fees that *Budinich* refused to distinguish from nonmerits fees were not "really" merits fees, but simply nonmerits fees inaccurately characterized by the law that authorized them. As a consequence, in respondents' view, the rule of *Budinich* does not apply when attorney's fees are "true" rather than *faux* merits fees—that is, when they are based on a contract rather than a statute.

This is an extraordinary assertion. There is no "brooding omnipresence in the sky," *S. Pac. Co.* v. *Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), that determines whether a particular attorney's fee award is "merits" or "nonmerits"; it is the positive law authorizing the award that does that. A statute that treats attorney's fees as part of the "merits" is no less conclusive as to the actual legal status of the fees than is a contract (or any other source of law) that treats them that way. And since, under *Budinich*, a fee award deemed part of the "merits" under a *statute* is treated as collateral, there is no basis for treating an award deemed part of the "merits" under a contract any differently.

The idea that statutory fees are always "nonmerits" fees is particularly hard to justify given the vast "number and variety" of statutory attorney's fee provisions, 1 Robert L. Rossi, *Attorneys' Fees* §6:19, at 6-71 (3d ed. 2013), and given also that many of them are not traditional "prevailing party" provisions but instead resemble the "costs of collection"

provision at issue here, which both the court below and respondents treat as a "merits" provision.[1]

d. In our opening brief (at 18-19, 36), we pointed out that the Eleventh Circuit's rule creates an additional problem of administrability in cases, like this, in which attorney's fees are sought under *both* a statute *and* a contract. Respondents argue that there is no problem in such cases, because, under the Eleventh Circuit's rule, "the disposition of the party's *contractual* fees claim alone will determine the time for appeal." Resp.Br.35. The reason for that, according to respondents, is that a contractual claim for fees is necessarily part of the merits, and so a decision will not be final until such a claim is resolved, whether or not there has been an award of *statutory* fees. Resp.Br.35-36.

As an initial matter, respondents' premise is incorrect, because *Budinich* makes clear that its rule applies even when a fee award is considered part of the "merits." But quite apart from that erroneous premise, *Budinich* demands a "practical approach," 486 U.S. at 202, and respondents' approach is not practical. On the contrary: in cases of this type in which fees are available under both a contract and a statute, respondents' rule would make the existence

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[1] See, *e.g.*, 16 U.S.C. §470aaa-6(b)(2) ("Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty *** shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings."); 33 U.S.C. §1319(g)(9) (same); 33 U.S.C. §1321(b)(6)(H) (same); 33 U.S.C. §3852(h) (similar); 42 U.S.C. §7413(d)(5) (similar); 42 U.S.C. §7524(c)(6) (similar); cf. JA26 (collective bargaining agreement) ("Any costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer.").

of appellate jurisdiction turn on whether the request for fees mentioned the contract. If it *did*, a single notice of appeal filed after the decision on fees would suffice to bring both that decision and the earlier decision before the court of appeals. But if the request for fees mentioned only the *statute*, a court applying respondents' rule would likely conclude that the earlier decision could not be appealed unless a separate notice was filed for that decision.

The jurisdiction of federal courts of appeals should not depend on such a trivial and arbitrary distinction. And a jurisdictional rule should not require appellate courts, before proceeding to the merits, to scour the record to determine whether attorney's fees were sought under a statute, a contract, or both.[2]

2. Respondents' defense of the Eleventh Circuit's rule lacks merit

Respondents defend the Eleventh Circuit's rule on the grounds that (a) all contractual attorney's fees are "damages"; (b) the rule reduces "piecemeal appeals"; and (c) it provides greater "certainty" than the rule we advocate. Each claim is baseless.

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[2] Any assumption that litigants are always careful about such matters is belied by this very case. While the affidavit supporting respondents' motion for attorneys' fees mentioned both ERISA and the collective bargaining agreement, JA74, their "notice of motion" mentioned only ERISA, JA72. It is perhaps unsurprising, therefore, that the district court's order awarding fees mentioned only ERISA as well. See Pet.Br.19 n.4.

a. *The rule cannot be justified on the ground that all contractual attorney's fees are "damages"*

Respondents' primary defense of the Eleventh Circuit's rule is that a decision is not final until damages are awarded and that contractual attorney's fees, unlike statutory fees, are always damages. Resp.Br.19-36. That is wrong for three reasons. First, even if contractual attorney's fees *are* always damages, *Budinich* makes clear that its rule still applies. Second, contractual attorney's fees are *not* always damages. Third, the whole point of *Budinich* is to simplify the jurisdictional inquiry, including by avoiding esoteric questions about whether particular fee awards are "damages," "costs," or something else.

i. *Budinich* itself rejected the idea that attorney's fees considered "damages" are exempt from its rule. To begin with, the "damages"-"costs" distinction is just one version of the "merits"-"nonmerits" distinction, and *Budinich* categorically rejected the latter. Indeed, that "no distinction should be drawn" between merits and nonmerits fee awards is "[t]he central aspect" of the decision. 15B Charles A. Wright *et al.*, *Federal Practice & Procedure* §3915.6, at 329 (2d ed. 1992).

Budinich also rejected respondents' particular version of the distinction. In holding that "merits" and "nonmerits" fees should be treated the same, this Court expressly disagreed with a lower court decision, *Holmes* v. *J. Ray McDermott & Co.*, 682 F.2d 1143 (5th Cir. 1982), that had concluded otherwise. See *Budinich*, 486 U.S. at 198, 201. *Holmes* held that the initial decision in that case, which had not resolved a request for attorney's fees, was not final because "the award of attorney's fees to [the plaintiff]

was an element of *damages* for [the defendant's] willful and arbitrary denial of maintenance and cure," 682 F.2d at 1147 (emphasis added), a right that is contractual in nature, see Pet.Br.25-26. That holding, which *Budinich* rejected, is respondents' position here.

In fact, the *Holmes* decision that this Court rejected in *Budinich* is one of the foundational precedents for the Eleventh Circuit rule that respondents urge this Court to adopt in this case. *Holmes* was followed in *Ierna* v. *Arthur Murray International, Inc.*, 833 F.2d 1472, 1475 (11th Cir. 1987), which in turn was followed in *Brandon, Jones, Sandall, Zeide, Koh, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349, 1355 (11th Cir. 2002) (per curiam), which is the post-*Budinich* Eleventh Circuit decision on which respondents rely here, see Resp.Br.20—and also the decision that was criticized by the Eleventh Circuit itself in a subsequent case, *Adeduntan* v. *Hospital Authority of Clarke County*, 249 F. App'x 151, 153-155 (11th Cir. 2007) (per curiam), as inconsistent with *Budinich*.

Respondents ignore *Holmes*, even though we discussed it in our opening brief (at 25-26). They do, however, cite *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962), for the proposition that "nonstatutory attorney's fees are damages, not 'costs.'" Resp.Br.29. *Vaughan* held that, while attorney's fees generally are not recoverable in federal court as part of the prevailing party's statutory "costs," they are recoverable as contractual "damages" in an action for maintenance and cure. 369 U.S. at 530. But *Vaughan* had nothing to do with appealability under 28 U.S.C. §1291, and it hardly supports the view that *Budinich*'s holding does not apply to contractual fee

awards. Quite the contrary: *Holmes* relied heavily on *Vaughan* in support of its holding that a decision leaving unresolved a request for nonstatutory attorney's fees is not final, *Holmes*, 682 F.2d at 1147 & n.7, and this Court rejected that holding in *Budinich*.

ii. Respondents' main defense of the Eleventh Circuit's rule is flawed for a second reason: not all contractual attorney's fees are in fact "damages." Before we explain why, it bears emphasis that respondents' submission necessarily depends on the idea that *all* contractual attorney's fees are "damages." Respondents do not contend, for example, that some contractual fees are "damages" and some "costs," and that their treatment for appealability purposes should vary depending on which they are. That is the position of the First Circuit, and respondents no longer defend it. Nor do respondents contend that some contractual fees are "damages" and some "costs," but that for appealability purposes they should all be treated as "damages." That would be the opposite of the position adopted by this Court in *Budinich*—which found that statutory fees may or may not be part of the "merits" but should all be treated as if they are not—and thus would be indefensible. So a necessary (though not sufficient) component of respondents' position is that all contractual fees are "damages." We now explain why they are not.

While it is possible to characterize *some* contractual attorney's fees as "damages" (as opposed to "costs"), it is not possible to characterize *all* of them that way. Even the First Circuit below, and the circuits with which it aligned itself, acknowledge that fact. Indeed, that is the very premise of the appealability rule they have adopted. Those courts recog-

nize, in particular, that an award of attorney's fees to the "prevailing party" under a contract is no more an award of "damages" than an award to the "prevailing party" under a statute.[3]

In defending the First Circuit's rule at the petition stage, respondents themselves endorsed this view. That contractual attorney's fees awarded as "damages" differ from those awarded to the "prevailing party," in fact, is one of the central themes of the brief in opposition. See, *e.g.*, Opp.10-15, 25-29.

On that issue at least, those four circuits (and respondents' prior position in this Court) are clearly correct. According to respondents, contractual damages "compensate[] the nonbreaching party for the injury suffered as a result of the breach." Resp.Br.26; see also Resp.Br.20. An attorney's fee award under a "prevailing party" provision—whether statutory or contractual—most certainly does *not* do that. As this Court explained in *Budinich* itself, "[s]uch an award does not remedy the injury giving

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[3] See *Carolina Power & Light Co.* v. *Dynegy Mktg. & Trade*, 415 F.3d 354, 362 (4th Cir. 2005) ("a contract [can] provide[] for an award of attorneys fees *** as costs to the prevailing party[] [or] as an element of damages"); *id.* at 363 (Wilkinson, J., concurring) ("contractual *** attorneys' fees [can be] remedial, i.e., an element of damages, or, *** awarded to a prevailing party as costs of the underlying action"); *Gleason* v. *Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001) (finding "no difference *** between payment of attorneys' fees to a prevailing party under statute and payment of attorneys' fees under the contract to a 'prevailing party'"); *Ragan* v. *Tri-County Excavating, Inc.*, 62 F.3d 501, 505 (3d Cir. 1995) (contractual attorney's fees can be "sought as part of damages" or "as prevailing party"); see also Pet. App. 9a (decision below); *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1047-1049 (8th Cir. 1991).

rise to the action, and indeed is often available to the party defending against the action." 486 U.S. at 200. That a *defendant* in a breach-of-contract action may be able to recover fees under a contractual "prevailing party" provision removes any possible doubt about whether such fees can be considered "damages," since a defendant will be able to recover in that circumstance only if there has *been* no breach.

In support of their new position at the merits stage, respondents rely principally, if not exclusively, on the idea that all contractual attorney's fee awards are "liquidated damages." Resp.Br.20-23. That is a curious theory, inasmuch as "liquidated damages" are "an amount of money fixed as damages" in the contract "that are to be payable in the event of breach." Restatement (Second) of Contracts §356 cmts. a & b (1981). An award of attorney's fees under a contract could therefore be considered "liquidated" only if "the parties specif[ied] the amount of such fees." *Id.* cmt. d. And even in that event, the fees could not be considered liquidated *damages* if they were made under a "prevailing party" provision, particularly if they were paid to a prevailing defendant.

No authority cited by respondents supports the view that *all* awards of contractual attorney's fees are "damages." And at least one authority supports the opposite view. Respondents quote (at 29-30) Professor Dobbs' treatise on remedies as follows: "When recovery of a fee award is permitted because the adversary has breached a duty to protect against [litigation] costs, the fee award is *damages*, not *costs*. One implication of this statement is that statutes and rules affecting *costs* thus have no bearing on such cases." Dan B. Dobbs, *Law of Remedies: Dam-*

ages-Equity-Restitution §3.10(3), at 286 (2d ed. 1993). But in the very next sentence, which respondents do *not* quote, Professor Dobbs says that "[a] second implication is that only one who is in the role of a plaintiff can recover attorney fees" under this principle and that "it is not enough to be a prevailing defendant to recover the fees discussed here." *Ibid.* When defendants recover contractual attorney's fees as the "prevailing party," in other words, the fees cannot be considered "damages."

Consistent with the decisions cited above (and with respondents' own position at the petition stage), Professor Dobbs' treatise thus supports the proposition that *some*, but not *all*, contractual attorney's fees are "damages." In fact, there is no reason to think that even a *majority* of contractual attorney's fee awards are "damages" (as opposed to "costs"), since bilateral "prevailing party" provisions are routinely included in commercial contracts.[4]

Treating contractual and statutory "prevailing party" awards differently is particularly unjustifiable because, while *Budinich* involved a *statutory* "prevailing party" provision, the underlying claim was *contractual*. 486 U.S. at 197. If respondents' position were correct, parties in contract actions would be subject to different rules depending on whether the "prevailing party" provision appeared in the con-

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[4] See, *e.g.*, *Buckhorn Inc.* v. *ORBIS Corp.*, ___ F. App'x ___, ___, 2013 WL 5273119, at *3 (Fed. Cir. 2013); *DocMagic, Inc.* v. *Mortg. P'ship of Am., L.L.C.*, 729 F.3d 808, 809 (8th Cir. 2013); *Dolphin LLC* v. *WCI Cmtys., Inc.*, 715 F.3d 1243, 1246 n.4 (11th Cir. 2013) (per curiam); *S. Walk at Broadlands Homeowner's Ass'n* v. *Open Band at Broadlands, LLC*, 713 F.3d 175, 186 (4th Cir. 2013); 1 *Attorneys' Fees* §9:25, at 9-64 n.4.

tract itself or in a statute that governed contract disputes. There is no sense in that.

The truth, in short, is that contractual attorney's fees are no different from statutory fees: the law sometimes treats them as distinct from the "merits" and sometimes as part of the "merits." Once this is understood, the foundation of respondents' position crumbles. If there is no difference between statutory and contractual fees in this respect, then there is no possible basis for applying *Budinich*'s rule to statutory but not contractual fees.

iii. There is a third reason to reject respondents' elaborate attempt to establish that all contractual (but not all statutory) attorney's fees are "damages": the enterprise itself is an illegitimate one. The whole point of *Budinich*'s emphasis upon "operational" over "conceptual" consistency, 486 U.S. at 202, is to avoid precisely this kind of theoretical hair-splitting about what is a "merits" (or "damages") fee award, as opposed to a "nonmerits" (or "costs") award.

The "distinction between fees that are 'compensation for injury' and those that are not" is "altogether too metaphysical." *Exch. Nat'l Bank*, 763 F.2d at 293. *All* fee awards, whether based on a statute, a contract, or some other source of law, "make the prevailing party better off." *Ibid.* Whether a particular award "is 'really' a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation" is "a question of semantics rather than substance." *Ibid.* It is thus a question that is irrelevant under *Budinich*.

b. *The rule cannot be justified on the ground that it reduces "piecemeal appeals"*

Respondents also defend the Eleventh Circuit's rule on the ground that it avoids "piecemeal appeals." Resp.Br.16-18, 39-42. That is also wrong for three reasons: the same argument was rejected in *Budinich*; an immediate appeal limited to the merits can be *more* efficient than a later appeal of the merits and fees together; and the Federal Rules of Civil Procedure provide a mechanism for avoiding "piecemeal appeals" when it is not.

i. If avoidance of "piecemeal appeals" were a reason to treat attorney's fee awards as non-collateral, *Budinich* would have been decided differently. That consideration is no more weighty for contractual fee awards than for statutory awards. Yet *Budinich* determined that, because attorney's fees are ordinarily separate from the merits, the earlier decision is subject to appeal upon entry, and that the need for consistency and predictability requires that the same rule be applied to fees that are *not* separate from the merits. *Budinich* necessarily concluded, therefore, that these considerations outweigh whatever benefits there might be in avoiding "piecemeal appeals."

But *Budinich* did not merely reject respondents' argument by implication; it rejected it expressly. The Court explained that "an appeal of merits-without-attorney's-fees when *** the attorney's fees [are deemed] part of the merits is no more harmful *** than an appeal of merits-without-attorney's-fees when [they are not]"—and, in particular, that the former is not "in any way (except nominally) a more piecemeal enterprise" than the latter. *Budinich*, 486 U.S. at 202. The point is that, if avoiding "piecemeal

appeals" is not a reason to treat "nonmerits" attorney's fees as non-collateral, then it is not a reason to treat "merits" fees that way either.

In fact, *Budinich* makes clear that avoidance of "piecemeal appeals" is not a reason to treat even "merits" fees awarded under a *contract* as non-collateral. As we have mentioned, *Budinich* expressly disagreed with the Fifth Circuit's decision in *Holmes*. In holding that contractual attorney's fees are non-collateral for appealability purposes, *Holmes* relied not only on the idea that such fees are "damages," but also on "[t]he policies against piecemeal appeals." *Holmes*, 682 F.2d at 1148. This Court thus explicitly rejected a decision that relied on two of the same theories that respondents advance here.

ii. Respondents' argument in any event rests on a mistaken premise: that a single appeal is always superior from the point of view of "efficient judicial administration." Resp.Br.41 (internal quotation marks omitted). It is not.

When a fee request raises complex issues that could be materially affected—if not entirely mooted—by the resolution of the appeal of the merits, it may be more efficient for the appeal of the merits to go forward alone. See Fed. R. Civ. P. 58 advisory committee's notes (1993). Indeed, in this very case, the parties briefed fee issues in the court of appeals, only to have the First Circuit direct the district court to recalculate the fee award in light of its reversal on the merits. See Pet.App.18a (declining to issue "advisory" opinion on fees).

iii. It is particularly unnecessary to adopt the Eleventh Circuit's rule to afford "the opportunity to hear the appeal of the entire case in a single proceed-

ing," Resp.Br.41, because the Federal Rules of Civil Procedure already afford that opportunity. Five years after this Court decided *Budinich*, Rule 58 was amended to provide that, when judgment is entered and a motion for attorney's fees remains pending, the district court "may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." Fed. R. Civ. P. 58(e). Federal Rule of Appellate Procedure 4(a)(4), in turn, provides that the time to file a notice of appeal does not begin to run until the district court has disposed of a Rule 59 motion.

Thus, in cases in which it is "more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case," the amendment enables district courts "to delay the finality of the judgment for appellate purposes *** until the fee dispute is decided." Fed. R. Civ. P. 58 advisory committee's notes (1993). There is no need to adopt the Eleventh Circuit's flawed rule for that purpose. Oddly, respondents make no mention of Rule 58 in their brief on the merits, even though they relied heavily on it in their brief in opposition in making a different argument (which, like their defense of the First Circuit's rule, they have since abandoned). See Opp.30-35.

c. *The rule cannot be justified on the ground that it provides "clarity"*

Respondents also defend the Eleventh Circuit's rule on the ground that it provides more "clarity" than our rule. Resp.Br.36-38. They argue, in particular, that litigants will have to "guess" whether our

rule covers "non-attorney professional fees," and they use this case as an example of the supposed problem, pointing out that the district court's initial decision "left both attorney's fees *and* auditor's fees unresolved." Resp.Br.36.

This is a peculiar argument. The unresolved request for auditor's fees here was encompassed within a motion that respondents themselves characterized, repeatedly, as one for "attorneys' fees and costs," JA72, 74, 79, and the requested "audit fees and costs" ($6,537.00) were barely one twentieth of the requested "attorneys' and paralegals' fees" ($126,912.30)—indeed, they were less even than the requested "costs and disbursements" ($10,151.14), JA75, 79. The idea that a request for a modest amount of auditor's fees in a motion for attorney's fees and costs could by itself render inapplicable *Budinich*'s "uniform" and "bright-line" rule is a rather extravagant one. Still more extravagant is the idea that this is a reason to exempt *all* contractual attorney's fee awards from *Budinich*'s rule.

Respondents insist that applying *Budinich* in this situation creates "substantial uncertainty," Resp.Br.38, but there is nothing *at all* uncertain about the rule we advocate. The rule is this: when a district court decides a case but leaves unresolved a motion for attorney's fees, the decision is subject to immediate appeal under *Budinich*, whether the motion is made under a statute or a contract (or, as here, both), and whether or not the motion also includes a request for "professional fees" that arguably are not "attorney's fees."

Although respondents rely on the facts of *this* case in support of their argument, they seem at least as concerned that our rule leaves the status of *stand-*

alone motions for "non-legal" professional fees "up in the air." Resp.Br.37-38. But they provide no real-world example of any case involving such a motion. All we would say about such a case, if it ever arose, is that, whether or not *Budinich* applied in that situation (and it likely would), the rule should be the same for "merits" and "nonmerits" awards, and for statutory and contractual awards. That *Budinich* might *not* govern when a decision leaves unresolved a *stand-alone* request for "non-attorney professional fees," however, provides no basis for concluding that it should not govern here.

B. Respondents' Fallback Position Is Also Incorrect

As a fallback, respondents urge the Court to affirm on the basis of a narrower rule: that, even if *Budinich* applies to contractual as well as statutory fees, it does not apply to either type when the requested award includes "nonlitigation" fees, no matter how insubstantial the amount. Resp.Br.42-52. Respondents' alternative argument goes as follows: *Budinich*'s holding—that a decision on the merits leaving unresolved a request for attorney's fees is final when entered—is limited to attorney's fees "for the litigation," *Budinich*, 486 U.S. at 199, 201; some of the fees requested here—the auditor's and attorney's fees incurred before the complaint was filed—were not "for the litigation"; accordingly, the initial decision in this case was *not* final when entered. Respondents make this argument despite the fact that the so-called "nonlitigation fees" amounted to less than $9,000 of the total requested award of more than $143,000. See Resp.Br.7, 43.

This rule is every bit as flawed as the Eleventh Circuit's broader rule. Indeed, it shares many char-

acteristics with the First Circuit rule that respondents no longer defend.

As an initial matter, the references to attorney's fees "for the litigation" in *Budinich* simply mean that its rule does not apply to attorney's fees for a *prior* case—the relief sought, for example, when an attorney sues a former client for unpaid fees. See Pet.Br.30 n.8. That obviously is not the situation here. Both the "litigation" and the "nonlitigation" fees are "attributable to *th[is]* case," *Budinich*, 486 U.S. at 203 (emphasis added)—*i.e.*, the dispute over contributions to union-benefit funds.

But respondents' fallback theory would be meritless even if *Budinich* meant something different. With unintended irony, respondents claim that their narrower theory provides both "operational consistency and predictability" and a "bright-line rule." Resp.Br.49, 51 (internal quotation marks omitted). In truth it provides neither. A rule requiring courts and litigants to distinguish between "minimally nonlitigation" and "totally litigation" fees is every bit as inimical to the policies underlying *Budinich* as one requiring them to distinguish between "merits" and "nonmerits" fees. Respondents would just substitute one case-specific, record-intensive, and complicated rule for another.

To determine whether requested attorney's fees are part of the "merits," and not subject to *Budinich* for that reason, the First Circuit's rule requires an analysis of both the particular contract and the underlying claim in each case. See Pet.Br.26. Similarly, to determine whether requested attorney's fees include "nonlitigation" fees (no matter how small), and are not subject to *Budinich* for *that* reason, respondents' fallback rule would require an analysis of

the entire fee submission in each case. The one here, for a relatively straightforward dispute, runs to 135 pages in the joint appendix. JA64-198.

Any standard for distinguishing "merits" from "nonmerits" fees is also uncertain and difficult to apply. See Pet.Br.26-31. The same is true of the standard—whatever it may be—for distinguishing "nonlitigation" from "litigation" fees, and thus for determining whether a particular fee request includes *any* "nonlitigation" fees. Respondents say that the line should be drawn at the point where the complaint was filed. Resp.Br.42-49. But there is no question that at least *some* work antedating the complaint can be "for the litigation," however that term is understood. See Pet.Br.29-30. As respondents elsewhere concede, their fallback rule would therefore require courts to determine in each case whether any fees incurred before the complaint was filed are "sufficiently remote from the litigation" to constitute "nonlitigation" fees. Resp.Br.38 n.15.

Respondents insist that the very small size of the "nonlitigation" fees here should be "of no relevance" to the inquiry. Resp.Br.50. But it is quite relevant. If respondents could demonstrate that what they call "nonlitigation" fees commonly make up a substantial proportion of the amount requested in a motion for attorney's fees and costs, there could conceivably be a legitimate question whether *Budinich* should apply in that situation—despite the problems, in both principle and practice, that such an exemption would create. In fact, however, respondents cannot cite even *one* real-world example of an attorney's fees motion in which "nonlitigation" fees were anything more than a small fraction of the overall request. Logic and experience suggest, moreover, that they

rarely if ever will be. See Pet.Br.28-29. This shows that the justifications for respondents' fallback rule are especially uncompelling.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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